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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988.

AETNA LIFE INSURANCE CO.,
Petitioner,

v.

FRANCISCO L. BORGES, TREASURER
OF THE STATE OF CONNECTICUT, and
STATE OF CONNECTICUT,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF
APPEALS FOR THE SECOND CIRCUIT

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QUESTION PRESENTED

Does the Employee Retirement Income Security Act of 1974 ("ERISA") pre-empt the application of State unclaimed property, or escheat, statutes to ERISA-covered benefit checks and drafts that have not been collected or presented for payment by the beneficiaries?

LIST OF PARTIES

The parties to the proceeding below were the respondents, Franciso L. Borges, Treasurer of the State of Connecticut, and the State of Connecticut, and the petitioner, Aetna Life Insurance Company.

Aetna Life Insurance Company is a wholly-owned subsidiary of Aetna Life & Casualty Company, which has no parent or affiliates. Other companies required to be disclosed by Rule 28.1 are: American Health Capital HIBI Management; American Health Capital Insurance Company, Ltd.; Dayton Arcade Community Redevelopment Corporation; Med Southwest, Inc.; Partners Joint Acquisition Company; and VHA Enterprises, Inc.

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1988

AETNA LIFE INSURANCE CO., *Petitioner,*

v.

FRANCISCO L. BORGES,

TREASURER OF THE STATE OF CONNECTICUT, and STATE OF CONNECTICUT, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner, Aetna Life Insurance Company, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit, entered in the above-entitled proceeding on February 23, 1989.

OPINIONS BELOW

The opinion of the Court of Appeals for the Second Circuit is reported at 869 F.2d 142, and is reprinted in the appendix hereto, p. A1.

The opinion of the United States District Court for the District of Connecticut (Nevas, D.J.), adopting the recommended ruling of United States Magistrate Margolis, is reported at 692 F.Supp. 94, and is reprinted in the appendix at A16. A prior opinion of the District

Court (Nevas, D.J.) has not been reported and is reprinted in the appendix at A34.

JURISDICTION

Petitioner invoked the federal question jurisdiction of the District Court pursuant to 28 U.S.C. § 1331. The District Court entered its opinion granting petitioner's motion for summary judgment and denying respondents' motion for summary judgment on June 28, 1988. Judgment was entered on that opinion on September 2, 1988. App. A41.

Respondents appealed from the judgment of the District Court, and on February 23, 1989, the Court of Appeals for the Second Circuit entered a judgment and an opinion reversing the judgment of the District Court. This petition for a Writ of Certiorari has been filed within 90 days of February 23, 1989. This Court has jurisdiction to review the judgment of the Court of Appeals pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The question presented depends on the effect of Sections 502 and 514 of ERISA, *codified at* 29 U.S.C. §§ 1132 and 1144 (1982), on the Connecticut escheat statute, specifically § 3-64a of the Connecticut General Statutes. Those statutes as well as related provisions of ERISA and of the Connecticut escheat statute referred to in this petition are reprinted in the appendix at A67-A90.

STATEMENT OF THE CASE

The Roles of the Parties

Petitioner, Aetna Life Insurance Company ("Aetna") is one of the country's largest providers of group health insurance policies. Most of these group

insurance policies are sold to sponsors of employee welfare benefit plans, *see* ERISA § 3(1), 29 U.S.C. § 1002(1) (1982), for the purpose of providing benefits covered by ERISA. *See* App. A60. When an ERISA plan participant or beneficiary[1] makes a claim for covered benefits under an Aetna policy, that claim is processed by Aetna[2] and a draft drawn on an Aetna account is issued to pay the claim. Aetna's policy has been to honor such drafts even if they are presented more than three years after they were issued. *See* Stipulation of Facts ("Stip.") ¶¶ 3, 5, 6, 34, App. A43-44, A49. *See also* App. A3.

Aetna bases its charge for group insurance primarily on the claim experience of the members of the group. Under the presented-basis accounting system used by Aetna, the experience rating of a group is not charged for a claim until the draft issued to pay that claim has been presented by the beneficiary for payment by Aetna. Stip. ¶¶ 8, 12, 15, 17, 21, App. A44-47. Thus, the ERISA plans have not been required to pay the face value of uncashed drafts issued to or on behalf of plan beneficiaries. *Id.*, ¶ 21, App. A47.

Although most drafts issued to pay ERISA benefits are presented for payment within a short time

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[1] Since ERISA's distinction between participants, *see* ERISA § 3(7), 29 U.S.C. § 1002 (7), and beneficiaries, *see* ERISA § 3(8), 29 U.S.C. § 1002 (8), is irrelevant to the question presented by this case, this Petition will henceforth use the term "beneficiaries" to include both classes of benefit recipients.

[2] Processing a claim includes reviewing the submission, making a determination of eligibility, and acting as the "appropriate named fiduciary" for the purpose of reviewing denied claims. *See* ERISA § 503, 29 U.S.C. § 1133; 29 C.F.R. § 2560.503-1(g)(1988).

after their issuance, some drafts are not presented.[3] The parties stipulated below that the value of drafts issued to or for ERISA plan beneficiaries prior to January 1, 1985 and not presented for payment exceeds $2,500,000. *Id.*, ¶ 33, App. A33.[4]

Respondent Borges, the Treasurer of the State of Connecticut, is the state official statutorily charged with enforcing the abandoned property laws of the respondent State.[5] Those laws are custodial in nature. Connecticut requires that after having notified the owner of property that is about to be deemed abandoned, the holder of that property must pay it over to the Treasurer within 90 days of the close of the calendar year in which the statutory presumption takes effect. Conn. Gen. Stat. § 3-65(a). The statutory abandonment period for the drafts at issue here is three years. *Id.*, § 3-64a.

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[3]Aetna's experience has been that approximately .03%, or $3.00 for every $10,000 in benefit drafts issued, remain unclaimed after three years. *See* App. A66.

[4] For drafts issued prior to January 1, 1982, Aetna did not maintain a record of the names and addresses of the payees. Stip. ¶ 25, App. A47. As the State of Aetna's corporate domicile, Connecticut claims the right to escheat all outstanding amounts for which there is no record of the mailing address of the payee. *See* Conn. Gen. Stat. § 3-66(b); *Texas v. New Jersey*, 379 U.S. 674 (1965). For drafts issued after January 1, 1982, Aetna retains the address of the payee in its records. *See* Stip. ¶ 26, App. A47-48. Accordingly, if the Second Circuit is correct, Aetna will be required to report and deliver to each of the jurisdictions with an applicable escheat or unclaimed property law the value of the unclaimed benefit drafts issued to payees with last known addresses in that State. Connecticut will receive the value of outstanding drafts issued to payees with addresses in Connecticut and the value of outstanding drafts issued to payees in States without applicable escheat or unclaimed property statutes. *See* p. 12, *infra*.

[5] Respondents will henceforth be referred to collectively as "the State" or "Connecticut".

When the holder transfers the abandoned property to the State, the State releases the holder from liability to the owner and assumes responsibility for all claims to the property. *Id.*, § 3-67(a); Stip. ¶ 42, App. A53. Upon proof satisfactory to the Treasurer, the claimant - the ERISA beneficiary - may claim it from the State at any time thereafter, Conn. Gen. Stat. § 3-70a, provided that the State has not obtained a judgment of escheat in a proceeding instituted 20 years after the property was turned over to the Treasurer. *Id.*, § 3-72a.[6] The only remedy available to a beneficiary dissatisfied with the decision of the Treasurer on his claim is an administrative appeal pursuant to the provisions of the Connecticut Administrative Procedure Act. *Id.*, § 3-71a.[7]

In 1981, as part of its effort to resolve a fiscal shortfall,[8] Connecticut reduced the holding period required to create a statutory presumption of abandonment for miscellaneous intangible property, such as the proceeds of unclaimed employee welfare benefit drafts, from 7 years to 3 years. *Id.*, § 3-64a. In addition, the State initiated an intensified program of audits of large potential holders of unclaimed property,

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[6] A bill recently approved by the Joint Committee on Finance, Revenue and Bonding of the Connecticut General Assembly would reduce the period before the Treasurer could seek a judgment of escheat from 20 years to 10 years. *See* Subst. Sen. Bill No. 1064, File No. 657, 1989 Conn. Gen. Ass., May 11, 1989.

[7] The appeal must be brought in the Superior Court in Hartford. Conn. Gen. Stat. § 3-71a. A copy of the appeal must be served on the Treasurer within 30 days of the mailing of notice of his decision, and the appeal must be filed within 45 days of that date. *Id.* § 4-183(c). Judicial review is confined to the record. *Id.* § 4-183(i).

[8] *See* Connecticut General Assembly, House Proceedings, Thurs., Nov. 19, 1981 at 2-3. *See generally* Uniform Unclaimed Property Act (1981 Act), Prefatory Note, 8A U.L.A. 617 (1983).

including Aetna. In 1982, Aetna and the State resolved that audit in a settlement agreement that left open the applicability of the escheat laws to unclaimed ERISA benefit drafts. Stip. ¶ 37, App. A51.

The District Court Proceedings

In 1984, Aetna filed the Complaint in this action, seeking both a declaratory judgment that ERISA pre-empts application of the state escheat statutes to unclaimed ERISA plan benefit drafts and an injunction prohibiting the State from seeking to enforce its escheat statutes with respect to such unclaimed funds.[9] After extensive discovery, the parties agreed to a stipulation of facts, App. A43-66, and filed cross-motions for summary judgment. On September 2, 1988, the District Court entered judgment granting a declaratory ruling in Aetna's favor and denying without prejudice the requested injunctive relief. App. A41.

The District Court's opinion rests its holding on § 514(a) of ERISA, 29 U.S.C. § 1144(a) (1982). That section provides that with certain specified exceptions, ERISA "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan. ..."[10] The District Court concluded that the escheat statutes "relate to" ERISA plans because the state statutes would affect the administration of plans, disrupt the relationship between the plans and their

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[9] Aetna filed this action in response to the State's initiation of a collection case in state court. The parties agreed to stay proceedings in the state court while the federal action proceeded. The state court action has been withdrawn by the State.

[10] The District Court held that none of the exceptions to § 514(a), including the insurance saving clause of § 514(b)(2)(A), apply to this case. App. A30-32. That holding was not challenged by the State on appeal to the Second Circuit.

beneficiaries, and impose a substantial economic cost on the plans. App. A27-28.

The District Court also relied heavily on the holding of the Eleventh Circuit in *Blue Cross & Blue Shield of Florida, Inc. v. Dept. of Banking & Finance*, 791 F.2d 1501 (11th Cir. 1986). *See* App. A28-29. In *Blue Cross & Blue Shield*, the Eleventh Circuit held that a provision of the contract between the Federal Government and Blue Cross that provided for the disposition of unclaimed federal employee health benefits pre-empted application of the Florida Unclaimed Property Act. The Eleventh Circuit found "no meaningful difference" between the reach of the pre-emption provision involved in that case, 5 U.S.C. § 8902(m)(1)(1982),[11] and § 514(a) of ERISA.

The District Court did not consider Aetna's alternative contention that the state statute is pre-empted because it conflicts with the civil remedy provision of § 502 of ERISA, 29 U.S.C. § 1132.

The Opinion of the Second Circuit

The Court of Appeals acknowledged all of the effects of applying the escheat statute to unclaimed ERISA benefits found by the District Court. Thus, the Court recognized that "Connecticut's escheat law has both an economic and administrative impact on ERISA

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[11] 5 U.S.C. § 8902(m)(1) provides as follows:

> The provisions of any contract under this chapter which relate to the nature or extent of coverage or benefits (including payments with respect to benefits) shall supersede and pre-empt any State or local law ... which relates to health insurance or plans to the extent that such law ... is inconsistent with such contractual provisions.

plans." App. A12. These impacts result from the requirements that money that would otherwise be unpaid be turned over to the State and that Aetna maintain the necessary records and implement the necessary procedures to comply with the escheat statutes of the several States.

Nonetheless, because the "escheat law has no effect on Aetna's original determination of an employee's eligibility for benefits", App. 12, the Court of Appeals characterized these effects as "indirect" and therefore insufficient to warrant application of § 514(a). In the Second Circuit's view, these effects on ERISA plans were no more intrusive than the effects of state garnishment laws. Since this Court's decision in *Mackey v. Lanier Collections Agency & Service, Inc.*, _____ U.S. _____, 108 S. Ct. 2182 (1988), found that state garnishment statutes are not pre-empted by § 514(a), the Court of Appeals concluded that state escheat statutes are also not pre-empted. *See* App. A9, A13-14. The Court of Appeals reasoned that "[t]he intrusion in the relationship between Aetna and plan beneficiaries [pursuant to the escheat laws] is no greater than that posed by the garnishment laws in *Mackey*. ..." App. A14. Finally, the Court rejected the District Court's conclusion that the burden imposed on plan beneficiaries by the escheat statute warrants pre-emption on the ground that "the procedures for recovering claims held by the State [are not] so much more complex than the procedures for collecting a more than three-year-old draft. ..." App. A14.

Since it rejected the District Court's holding that § 514(a) pre-empts application of the unclaimed property statutes, the Court of Appeals also addressed Aetna's claim of pre-emption by § 502 of ERISA. The Second Circuit recognized that § 502 "is the exclusive vehicle" for ERISA plan beneficiaries to recover ERISA benefits. App. A15, citing *Pilot Life Insurance Co. v. Dedeaux*, 481

U.S. 41 (1987). The Court of Appeals held, however, that § 502's exclusivity applies only to actions to establish a right to benefits, not to actions to collect those benefits:

> We do not find, however, that Connecticut's escheat law provides beneficiaries with an alternative cause of action for recovering benefits. The escheat law affects only the procedures for collecting benefits after a draft has already been issued. It does not provide a civil action governing the issuance of drafts in the first instance.

App. A15.

REASONS FOR GRANTING THE WRIT

Summary of Argument

This case deserves review under all of the standards established by this Court. Virtually every State has an escheat statute, each with its own set of administrative requirements. Because of the economic and administrative effect of escheat statutes on ERISA plans nationwide, the issue presented is "an important question of federal law which has not been, but should be, settled by this Court." Sup. Ct. R. 17(c).

The Second Circuit's opinion distorts the plain language of § 502 of ERISA, depriving plan beneficiaries of the civil remedies this Court has recognized as central to the congressional scheme. The decision below also imposes unprecedented and unsupportable limits on the reach of § 514 of ERISA, a pre-emption provision this Court has characterized as uniquely comprehensive. In part, the opinion below reaches these conclusions because it misconstrues and misapplies the

recent opinion of this Court in *Mackey v. Lanier Collections Agency & Service, Inc., supra*. This Court should grant review because the Second Circuit has decided the important federal question presented "in a way in conflict with applicable decisions of this Court." Sup. Ct. R. 17(c).

The opinion of the court below conflicts with the opinion of the Eleventh Circuit in *Blue Cross & Blue Shield of Florida, Inc. v. Department of Banking & Finance, supra*. The operative statutory language construed in *Blue Cross* and in this case is identical, but the results reached are diametrically opposed. This Court should grant review to resolve the conflict between the courts of appeal. Sup. Ct. R. 17(a).

I. The Decision Of The Second Circuit Severely Burdens ERISA Plans And Presents A Question Of National Importance.

This Court recognized in *Fort Halifax Packing Co., Inc. v. Coyne*, 482 U.S. 1, 11 (1987), that complying with a State-created

> patchwork scheme of regulation would introduce considerable inefficiencies in benefit program operation, which might lead those employers with existing plans to reduce benefits, and those without such plans to refrain from adopting them.

As one of its principal goals in enacting ERISA, Congress intended to preclude the States from imposing such costs on ERISA plans.[12] *See, e.g., Shaw v. Delta Airlines, Inc.*, 463 U.S. 85, 96-100 (1983). The decision below substantially undermines this congressional purpose by exposing ERISA plans to the regulatory requirements of the various state escheat statutes.[13]

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[12] These costs are not speculative. The parties stipulated that prior to the State's assertion of escheat liability in 1982, Aetna made no effort to contact payees of outstanding drafts, as escheat statutes require, *see* pp. 12-13 & nn. 16-18 *infra*, because of the expense of doing so. As of the date of the stipulation, Aetna still considered it inefficient to contact payees of outstanding drafts for amounts less than $100. Stip. ¶ 26, A47. *See also*, Uniform Unclaimed Property Act (1981 Act) § 17 Comment, 8A U.L.A. 653 (1983) (recognizing expense of preparing and mailing notice).

[13] The fact that the unclaimed benefit payments sought by the State in this case derived from plans that have delegated the claim process to Aetna rather than from plans that handle claims themselves does not reduce the protection from state regulation that Congress intended to confer. *See Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41 (1987). Congress explicitly contemplated that insurers such as Aetna would perform these functions. *See, e.g.*, ERISA §§ 3(1), 102(b), 103(a)(2), 401(b)(2), 29U.S.C. §§ 1002(1), 1022(b), 1023(a)(2), 1101(b)(2). *See also*, 29 C.F.R. § 2560.503-1 (1988).

Neither the Second Circuit's opinion nor the Connecticut statute distinguishes between insured and uninsured ERISA benefits. Indeed, the 1981 version of the Uniform Act specifically defines intangible property to include

> (v) amounts due and payable under the terms of insurance policies; and
>
> (vi) amounts distributable from a trust or custodial fund established under a plan to provide health, welfare, pension, vacation, severance, retirement, death, stock purchase, profit sharing, employee savings, supplemental

Forty-eight of the fifty States, plus the District of Columbia and the Virgin Islands, have some form of abandoned property or escheat legislation in force. *See* Uniform Unclaimed Property Act (1981 Act), Prefatory Note, 8A U.L.A. 617 (1983).[14] These state laws presume that property is abandoned after varying amounts of time have passed.[15] Statutory requirements that the holders of property give notice to the presumed owner incorporate these inconsistent statutory abandonment periods and add their own measure of inconsistency.[16]

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unemployment insurance, or similar benefits.

Uniform Unclaimed Property Act (1981 Act) § 1(10), 8A U.L.A. 628 (1983). The Comment to this provision states that it is not a substantive addition to the 1966 Uniform Disposition of Unclaimed Property Act, which is in force in 18 jurisdictions, 8A U.L.A. (Supp. 1989) 55, but merely a specification of property often overlooked when enforcing that Act. 8A U.L.A. 630 (1983).

[14] There have been three versions of a uniform act governing unclaimed property. The latest published compilation indicates that 37 States plus the District of Columbia and the Virgin Islands have enacted substantial portions of one or more of the three versions. *See* 8A U.L.A. (Supp. 1989) 55, 72, 243. Connecticut has not adopted a uniform act, although much of the Connecticut statute appears to be borrowed from various versions of the uniform act.

[15] *Compare, e.g.*, Conn. Gen. Stat. § 3-64a (1987) (3-year abandonment period) *with* Uniform Unclaimed Property Act (1981 Act) § 2, 8 U.L.A. 630 (1983) (5-year period) *and* Uniform Disposition of Unclaimed Property Act (1966 and 1954) § 9, 8A U.L.A. 172-73, 243 (1983) (7-year period).

[16] *Compare, e.g.*, Uniform Unclaimed Property Act (1981 Act) § 17(e), 8A U.L.A. 652 (1983) (notice must be given not more than 120 days before filing report of property presumed abandoned) *with* Conn. Gen. Stat. § 3-65a (1987) (holder to give notice within one year before presumption of abandonment to take effect). In New York, the holder must publish the list of names of apparent owners in a newspaper of general circulation within thirty days after the property has been reported to the Comptroller of that State. N.Y. Abandoned Property

In some States, the holder is required to attempt to notify the owner of the property regardless of the amount at stake;[17] in others, notification is required only if the amount at stake meets a statutory minimum.[18]

The administrative costs of complying with escheat laws are far from the only burden imposed on ERISA plans by the Second Circuit's decision. The immediate cost of the decision below is in excess of two and one-half million dollars for the years prior to 1985.[19] On a national basis, ERISA welfare plans providing health care benefits alone may be required to turn over to the states tens of millions of dollars annually that might otherwise have been used to lower costs or increase benefits.[20] By exposing ERISA plans to this recurring national assessment, the opinion of the Second Circuit flies in the face of Congress' desire to encourage more

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Law § 1316 (McKinney Supp. 1989). The cost of the publication is to be charged against the abandoned property. *Id.*, § 1409.

[17] *See, e.g.*, Conn. Gen. Stat. § 3-65a(a).

[18] *Compare, e.g.*, N.H. Rev. Stat. Ann. § 471-C: 19 V (Supp. 1988) ($25.00 minimum) *with* Uniform Unclaimed Property Act (1981 Act) § 17(e)(ii), 8A U.L.A. 653 (1983) ($50.00 minimum).

[19] Aetna's annual ERISA benefit payments under insured group health policies alone are approximately 1.15 billion dollars a year. Thus, the annual cost to plans insured by Aetna is likely to be in excess of $350,000 annually. *See* n.3 *supra*

[20] Private insurance, mostly financed by employers, pays approximately one third of the country's current health bill of $590 billion a year. N.Y. Times, May 8, 1989, at D1, col. 3. If only two-thirds of the $196.5 billion annual total of insurance payments represents ERISA benefits, *but cf.* App. A60 (81% of Aetna group health payments are ERISA benefits), and if Aetna's unclaimed property experience is typical, *see* n.3 *supra*, the potential annual escheat cost exceeds $39 million. The ultimate escheat bill for ERISA plans would be even greater because this total does not include benefits other than health costs.

employers to provide more benefits by shielding them from state regulation. *See, e.g., Shaw v. Delta Airlines, Inc., supra*, 463 U.S. at 105 & n.25; *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 517 (1981).

Recognizing the substantial burdens imposed on multi-state employers and plans by the state escheat statutes, the nation's largest employer, the Federal Government, has exempted its own employee welfare plans from those statutes. The Federal Government has accomplished this result by inserting into its contracts with health insurance providers a specific provision that directs the disposition of unclaimed benefit payments in a manner contrary to state escheat laws. *See Blue Cross & Blue Shield v. Department of Banking & Finance, supra*, 791 F.2d at 1503.[21] The authority for this pre-emptive contractual provision is a statute modeled by

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21 The federal contract provision requires the carrier to void benefit checks that have been outstanding for two or more years and to credit the proceeds to a special reserve. The proceeds remain in that reserve despite the maturation of the presumption of abandonment under state law.

Under the escheat statutes of most States, private contractual provisions requiring outstanding instruments to be voided after a specified period of time would be disregarded for the purpose of determining escheat responsibility. *See e.g.*, Uniform Unclaimed Property Act (1981 Act) § 29(a), 8A U.L.A. 667 (1983) (expiration of contractual period during which claim can be made to be disregarded); Utah Code Ann. § 78-44-30(3) (1987) ("no corporation or business may act...by private agreement, or otherwise, to circumvent the unclaimed property process by making a private escheat which would take or divert funds or personal property into income, or divide it among locatable patrons or stockholders, or place it in education or other funds, or divert such funds or personal property by any other type of appropriation.") State courts have reached the identical result even in the absence of explicit statutory language. *See, e.g., Blue Cross of Northern California v. Cory*, 120 Cal. App. 3d 723, 174 Cal. Rptr. 901 (1981). Thus, under the ruling of the court below, private employers and plans would not be able to avoid the burdens of complying with state escheat laws by modifying plan provisions.

Congress on the pre-emption provision of ERISA. *See* p. 7 & n.11 *supra*.

This Court should grant review to determine whether the Second Circuit correctly concluded that Congress intended private sponsors and plans to be subject to the State-imposed burdens of escheat from which it chose to exempt the Federal Government's own employee welfare benefit plans.[22]

II. The Holding Of The Second Circuit Ignores The Plain Language Of Section 502 Of ERISA And Denies Beneficiaries The Remedies Provided By Congress.

Section 502 of ERISA provides a federal cause of action for a participant or beneficiary

> to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan.

ERISA § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B) (1982). Congress provided concurrent jurisdiction in both state and federal courts for Section 502(a)(1)(B) actions. ERISA § 502(e), 29 U.S.C. § 1132(e) (1982).

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[22] ERISA's requirement that vested benefits be non-forfeitable applies only to pension plans, not to welfare plans. *See* ERISA §203(a), 29 U.S.C. § 1053(a). Thus, ERISA would allow private plans to adopt the option followed by the Federal Government, as the sponsors of plans insured by Aetna have done in effect through Aetna's use of presented-basis accounting. *See* p. 3 *supra*. Only state escheat law precludes private plans from implementing this option. *See* n. 21 *supra*; *cf. Alessi v. Rabyestos-Manhattan, Inc.*, *supra*, 451 U.S. 504 (pre-empting New Jersey statute that prevents plans from adopting option permitted by Congress).

The civil remedy provided by § 502 is an integral part of the federal statutory scheme. *Metropolitan Life Insurance Co. v. Taylor*, 481 U.S. 58, 65 (1987). It is also exclusive. *Pilot Life Insurance Co. v. Dedeaux*, *supra*, 481 U.S. at 52. State law can neither enlarge nor diminish the remedies Congress has provided.

Connecticut's escheat statute, however, purports to displace completely the federal remedy. Under Connecticut law, *see* p. 5, *supra*, as under the escheat or unclaimed property laws of every State, the holder of unclaimed property is discharged from liability to the owner and that liability is assumed by the State.[23] In order to collect his property from the State, the owner, in this case an ERISA plan beneficiary, is remitted to state law administrative and judicial remedies.[24]

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[23] This Court has repeatedly held that due process requires that a State that compels a holder to turn property over to it relieve the holder of potential liability to other claimants. *See Pennsylvania v. New York*, 407 U.S. 206, 209 (1972); *Western Union Telegraph Co. v. Pennsylvania*, 368 U.S. 71, 75 (1961). This requirement is implemented in § 20 of the 1981 Uniform Act, which provides that:

> A person who pays or delivers property to the administrator in good faith is relieved of all liability to the extent of the value of the property paid or delivered for any claim then existing or which thereafter may arise or be made in respect to the property.

Uniform Unclaimed Property Act (1981 Act) § 20(a), 8A U.L.A. 656 (1983). Earlier versions of the Uniform Act contained identical provisions. *See* Uniform Disposition of Unclaimed Property Act (1966) § 14, 8A U.L.A. 188 (1983); Uniform Disposition of Unclaimed Property Act (1954) § 14, 8A U.L.A. 253 (1983).

[24] *See* p. 5 & n.7 *supra*. The State asserted below that the Eleventh Amendment precludes a beneficiary from asserting in federal court a § 502(a) claim against the Treasurer to recover benefits in the Treasurer's possession. Reply Brief of the Defendants 5, *Aetna Life Ins. Co. v. Borges*, 869 F.2d 142 (2d Cir. 1989).

The conflict between state and federal law could not be more clear: federal law creates an exclusive remedy to recover ERISA plan benefits, while state law purports to discharge Aetna from liability under the federal statute and to direct plan beneficiaries or participants to state administrative and judicial remedies. Nonetheless, the Second Circuit concluded that there is no conflict. In its view, § 502 provides an exclusive federal remedy only for parties seeking to establish a right to benefits, not for parties seeking actually to collect those benefits:

> The escheat law affects only the procedures for collecting benefits after a draft has already been issued. It does not provide a civil action governing the issuance of drafts in the first instance.

App. A15.

Nothing in § 502 supports the Second Circuit's conclusion that the exclusive federal right of action "to recover benefits", ERISA § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B), extends only to "the issuance of drafts in the first instance" and does not control "the procedures for collecting benefits." The word "recover" means "to obtain by judgment in a court of law," *Random House Dictionary of the English Language* 1613 (2d ed. 1987); it is not limited to establishing a right to obtain compensation.[25] A lawyer who marked a judgment that his client "recover" a specified sum as satisfied when a draft had been issued, but before funds had been

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[25] Section 502 itself reflects the distinction between recovering benefits and establishing a right to benefits. Congress explicitly provided in § 502 both for actions "to recover benefits" and for actions "to enforce" and "to clarify" rights under a plan.

transferred to his client's credit, would surely be guilty of malpractice.

This Court should grant review to correct the Second Circuit's truncation of the exclusive federal remedy "that lies at the heart" of ERISA. *Metropolitan Life Ins. Co. v. Taylor, supra,* 481 U.S. at 65.[26]

III. The Second Circuit's Decision Erroneously Limits The Reach Of Section 514 Of ERISA.

This Court has repeatedly observed that in enacting § 514(a) of ERISA, Congress created a uniquely broad and comprehensive pre-emption of state law. *See e.g., Metropolitan Life Ins. Co. v. Taylor, supra,* 481 U.S. at 64; *Franchise Tax Board v. Construction Laborers Vacation Trust,* 463 U.S. 1, 24 n.26 (1983). The broad language of § 514(a) must be interpreted, "in the normal sense of the phrase", to pre-empt state law "if it has a connection with or reference to" an ERISA plan. *Shaw v. Delta Airlines, Inc., supra,* 463 U.S. at 96-97. Congress commanded pre-emption whether the state law intrudes directly or indirectly into the workings of ERISA plans. *Alessi v. Raybestos-Manhattan, Inc., supra,* 451 U.S. at 525. Section 514(a) encompasses

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[26] In addition to interfering with the civil judicial remedy provided by Congress in § 502, the escheat procedures interfere with the internal plan remedies Congress required in § 503(2), 29 U.S.C. § 1133(2). § 503(2) requires that a claimant whose claim for benefits is denied be given an opportunity "for a full and fair review by the appropriate named fiduciary of the decision denying the claim." *See* 29 C.F.R. § 2560.503-1(g)(1988). Nothing in the statute or regulations suggests that these provisions do not apply to a claim for benefits represented by an unpresented draft. By limiting a beneficiary to the Treasurer's claim procedures, the escheat statute denies the beneficiary his right to have a denial of his claim reviewed by an "appropriate named fiduciary". The Treasurer is not "the appropriate named fiduciary" because he has not been so designated by the plan. *See id.*, § 2560.503-1(g)(2). *See also* n.24, *supra*.

within its broad scope state laws that affect either the nature of ERISA benefits or the administration of benefit plans. *Fort Halifax Packing Co., Inc. v. Coyne*, *supra*, 482 U.S. at 13 & n.8; *id* at 26 (White, J., dissenting).

The Second Circuit refused to believe that Congress and this Court mean what they have said. Instead, the appellate court repeatedly – and without explanation – characterized the acknowledged administrative and economic effects of escheat laws on ERISA plans, as well as the intrusion into the relationship between the plans and their beneficiaries, as "indirect", App. A11-14, and therefore outside of § 514(a)'s reach. Even if this characterization of the effects of the state law were correct,[27] it would be irrelevant. For the purposes of § 514, Congress explicitly

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[27] The Second Circuit's opinion contains some suggestion that the court considers the effects on ERISA plans to be "indirect" because they result from a statute of general application. *See* App. A10, A12. The only exception to the scope of § 514(a) for generally applicable laws, however, applies to "any generally applicable criminal law of a State," ERISA § 514(b)(4), 29 U.S.C. § 1144(b)(4)(1982), an exception that does not apply to this case.

To the extent that the Second Circuit's characterization is based on the fact that the plans involved here have delegated the claim handling and payment process to an insurer, the court fails to acknowledge Congress's recognition of the role of insurance in ERISA plans. *See* n.13, *supra*. Moreover,the administrative effect of escheat on ERISA plans is direct, in any meaningful sense of the word, because the escheat statutes mandate the compilation and retention of records, the repeated preparation of reports, and the implementation of procedures pertaining to notification of beneficiaries. *See* pp. 12-13, *supra*. Similarly, the economic effect is direct because it results from the state law's direction of the disposition of plan benefits. The escheat statute's intrusion into the plans' handling of unclaimed benefits is far more intrusive than the regulation of prices charged by third-party suppliers to plan beneficiaries that was sustained against a pre-emption challenge in *Rebaldo v. Cuomo*, 749 F.2d 133 (2d Cir. 1984), *cert. denied*, 472 U.S. 1008 (1985). The Second Circuit's reliance on *Rebaldo* is unwarranted.

defined the term "State" to include any State or local governmental authority "which purports to regulate, *directly* or *indirectly*, the terms and conditions of employee benefit plans. ..." ERISA § 514(c)(2), 29 U.S.C. § 514(c)(2) (1982) (emphasis added).

The Second Circuit's opinion suggests two other rationales for its holding, neither of which correctly construes § 514(a). First, the court indicates that § 514(a) applies only to laws that have "an effect on the primary administrative functions of benefit plans, such as determining an employee's eligibility for a benefit and the amount of that benefit." App. A11. *See also* App. A12. Nothing in § 514(a) or in this Court's opinions supports that restriction.[28] Rather, as this Court has explained, Congress enacted § 514(a) to assure that plans would not "... be required to keep certain records in some States but not in others ... [or] to process claims in a certain way in some States but not in others. ..." *Fort Halifax Packing Co., Inc. v. Coyne, supra*, 482 U.S. at 9. The application of state escheat statutes to unclaimed ERISA plan benefits imposes exactly those requirements.

Moreover, even if the Second Circuit's restricted view of § 514(a) were correct, its holding is not. The "administrative function" affected by state escheat statutes is the function of actually paying benefits. Under any understanding of the purpose of employee benefit plans, the transfer of money from the entity

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[28] In *Fort Halifax Packing Co., Inc. v. Coyne, supra*, this Court noted that it had rejected the contention that § 514(a) protects plans only against state law interference with their administration, not against state law dictation of the benefits they must pay. *See* 482 U.S. at 13 & n.8. Ironically, the standard proposed by the Second Circuit would protect ERISA plans from state interference with the criteria for determining benefit eligibility and the extent of the benefits to be paid, but would expose them to extensive state regulation of their administrative processes.

holding funds on behalf of the plan to the beneficiary must constitute a "primary administrative function[]" of ERISA plans.

The Second Circuit's other suggested rationale for its holding is its apparent belief that the burdens imposed on ERISA plans and plan beneficiaries by escheat statutes are insignificant. For example, the Second Circuit recognized that the operation of the escheat statute substitutes the State for Aetna as the party to whom a beneficiary must look to receive payment. The Second Circuit also acknowledged that it is more difficult for a beneficiary to recover funds from the State than for that same beneficiary to recover them from Aetna by presenting an old draft.[29] The Court held, however, that the burdens imposed by state law are not great enough to warrant pre-emption. App. A14 & n.7.

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[29] A stale draft presented at any bank in the country will be transmitted through banking channels to Aetna. Aetna's policy is to honor such drafts. Stip., ¶ 34, App. A49. To collect funds from the State, the beneficiary must file a claim with the State Treasurer; he cannot simply present his claim to any bank. Moreover, if the Treasurer is for some reason unconvinced by the claim, the beneficiary must seek relief in a Connecticut state court pursuant to the short time limits and rigorous procedural requirements of the Connecticut Administrative Procedure Act. *See* n.7 *supra*. If a beneficiary happens to have failed to claim benefits directed to him in more than one State, he would have to seek those benefits from the appropriate administrative officer of each State. Aetna, by contrast, does business in every State, thereby enabling it to serve the needs of plans with beneficiaries spread around the country.

Congress recognized the importance of ready geographical access to remedies when it provided nationwide service of process and venue in any district where a defendant can be found for federal court actions under § 502, as well as concurrent jurisdiction in all state courts of competent jurisdiction. ERISA § 502(e)(2), 29 U.S.C. § 1132(e)(2)(1982). The holding below limits a beneficiary to a state court administrative appeal in Hartford. *See* n.7 *supra*.

In *Sommers Drug Stores Co. Employee Profit Sharing Trust v. Corrigan Enterprises, Inc.*, 793 F.2d 1456 (5th Cir. 1986), *cert. denied*, 479 U.S. 1089 (1987), the Fifth Circuit held that a state law "relates to" ERISA plans within the meaning of § 514(a) if it "affects relations among the principal ERISA entities." 793 F.2d at 1468. It is difficult to imagine a more intrusive effect on relations among the principal ERISA entities than the mandated substitution of the State for the party that the ERISA plan has chosen to pay benefits to plan beneficiaries and participants.

The clear line drawn by the Fifth Circuit would preclude States from inserting themselves between ERISA plans and their beneficiaries. The nebulous analysis adopted by the Second Circuit does not. This Court should grant review in order to correct the Second Circuit's narrow and erroneous view of the reach of § 514(a).

IV. The Opinion Of The Second Circuit Conflicts With The Opinion Of The Eleventh Circuit In *Blue Cross & Blue Shield v. Department of Banking & Finance*.

The Second Circuit went out of its way to disclaim any inconsistency between its conclusion and the holding of the Eleventh Circuit in *Blue Cross & Blue Shield of Florida v. Department of Banking & Finance, supra*. *See* App. A13-14 n.5. The reasoning supporting that disclaimer is tortured and unconvincing.

In *Blue Cross*, the Eleventh Circuit held that Florida's Unclaimed Property Act was pre-empted by a provision of the contract between the Federal Government and Blue Cross, a provider of health benefits to federal employees. The statutory basis for that holding is a pre-emption provision that uses the same operative phrase as § 514(a). Under the statute in *Blue Cross*, pre-emption depended on a conflict between

federal contract provisions that "relate to the nature or extent of coverage and benefits (including payments with respect to benefits)", and a state law that "relates to health insurance or plans. ..." 5 U.S.C. § 8902(m)(1) (1982). *See* p. 7 & n.11 *supra*. The Eleventh Circuit held that the Florida escheat law "relates to health insurance or plans" because it "purports to direct the disposition of unclaimed health insurance benefits still in the hands of the benefit provider." 791 F.2d at 1506.[30]

The Second Circuit attempted to reconcile its holding with the holding of the Eleventh Circuit on the ground that ERISA has a broader pre-emptive scope than does § 8902(m)(1). *See* App. A13-14 n.5. According to the court below, the fact that ERISA's pre-emption provision reaches more broadly requires the courts to develop and apply exceptions to ERISA pre-emption, whereas courts construing § 8902(m)(1) can apply the statute as it is written. In other words, the very breadth of ERISA pre-emption explains why a statute that "relates to health insurance or plans" under a narrower pre-emption provision does not "relate to" plans under § 514(a) of ERISA.

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[30] Apparently, neither the *Blue Cross* court nor the parties had any doubt that the contract provision specifying what should be done with unclaimed benefits "relate[s] to the nature or extent of coverage and benefits".

This reasoning is backwards. It can not reconcile the holding below with the holding of the Eleventh Circuit. It does, however, highlight the extraordinary unwillingness of the Second Circuit in this case to give ERISA plans the protection Congress intended them to have.

This Court should grant review to resolve the conflict between the Courts of Appeals. [31]

V. The Opinion of the Second Circuit Misapplies This Court's Opinion In *Mackey v. Lanier Collections Agency.*

In *Mackey v. Lanier Collections Agency & Service, Inc., supra*, this Court held that state garnishment laws are not pre-empted by § 514(a). The Court's rationale in *Mackey* relies entirely on the implications for § 514(a) of the fact that Congress in § 502(d) of ERISA authorized ERISA plans to sue or be sued. *See* 108 S. Ct. at 2186-88. The Court reasoned that by allowing plans to "sue or be sued", Congress authorized the use against plans of the ordinary state law remedies for enforcing a judgment. *Id.* at 2187. Since Congress intended state-law garnishment

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[31] Two advisory opinions of the United States Department of Labor have concluded that state unclaimed property laws were pre-empted by ERISA. Dept. of Labor Advisory Opinion 78-32A, Dec. 22, 1978 (involving Illinois law); Dept. of Labor Advisory Opinion 79-30a, May 14, 1979 (involving California law) (available on LEXIS, Labor/ERISA data base). Both of those opinions dealt with the application of unclaimed property laws to pension benefit plans. In Advisory Opinion 83-39A, July 29, 1983, the Department of Labor concluded that § 1316 of the New York Abandoned Property Law, which applies to unclaimed insurance proceeds other than life insurance, was not pre-empted because of the insurance saving clause of § 514(b)(2)(a). That opinion was issued before this Court held that the reach of the saving clause is to be determined by applying the factors relevant to analysis of the McCarran-Ferguson Act. *See Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 742-44 & n.21 (1985).

remedies to be available against the plans, it could not have intended to include such remedies within the pre-emptive reach of § 514(a). Finally, the Court concluded, since state garnishment laws were not pre-empted by § 514(a) when invoked by a plan creditor, they could not be pre-empted by § 514(a) when invoked by the creditors of plan beneficiaries. *Id.*, at 2188.

Mackey is unique among this Court's opinions construing § 514. Unlike this Court's other opinions, the Court's opinion in *Mackey* does not attempt to evaluate the effect of the application of state law to ERISA plans. Rather, the Court follows to its conclusion the canon that a statute should be construed to be internally consistent.[32]

The Second Circuit, however, uses the garnishment statutes as the measuring rod for determining whether other statutes "relate to" ERISA plans. In the very footnote in which the Court of Appeals acknowledges that *Mackey's* reasoning has no bearing on the question of pre-emption of escheat statutes, the Court below states

> *Mackey* nonetheless provides an example of a state statute with an indirect effect on ERISA plans that the Court did not find inconsistent with ERISA.

App. A9 n.2. Although nothing in the *Mackey* opinion suggests that this Court viewed the impact of

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[32] For this reason, the majority opinion in *Mackey* does not respond to the dissent's explication of the administrative burdens imposed on plans that must respond to garnishments directed against plan beneficiaries. *See* 108 S. Ct. at 2191-93 (Kennedy, J., dissenting).

garnishment laws on plans as "indirect",[33] the Court of Appeals concludes that escheat statutes do not "relate to" ERISA plans because the "indirect" burdens imposed by those statutes are no greater than the "indirect" burdens imposed by garnishment laws. *See* App. A13-14 .

Thus, the Second Circuit misuses *Mackey* to transform the sweeping pre-emption provision enacted by Congress into an invitation to the courts to compare the burdens of a challenged statute with the burdens imposed by state garnishment laws. As the Second Circuit's opinion itself demonstrates, the resulting analysis is inherently subjective and divorced from the congressional intent "to pre-empt the field for Federal regulations ..., thus eliminating the threat of conflicting or inconsistent State and local regulations of employee benefit plans." *Pilot Life Insurance Co. v. Dedeaux, supra*, 481 U.S. at 46, quoting 120 Cong. Rec. 29197 (1974) (remarks of Sen. Williams). If the courts must answer the question how much state regulation is too much in order to determine whether § 514(a) applies, that "virtually unique pre-emption provision," *Franchise Tax Board v. Construction Laborers Vacation Trust, supra*, 463 U.S. at 24 n.26, adds nothing to the command of the Supremacy Clause that state statutes must give way if they frustrate Congress' purposes.

This Court should grant review to correct the erroneous understanding of the Second Circuit and to prevent other courts from following the path the Second Circuit has charted.

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[33] Even if the Court of Appeals were correct that this Court considered garnishment laws to have only an "indirect" effect on ERISA plans, that characterization has no significance under § 514(a). *See p. 20, supra*.

CONCLUSION

For the reasons stated above, this Court should grant its Writ of Certiorari to review the decision of the United States Court of Appeals for the Second Circuit in this matter.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 658 -- August Term 1988
Argued: January 25, 1989 Decided: February 23, 1989

Docket No. 88-7843

AETNA LIFE INSURANCE COMPANY,
Plaintiff-Appellee,

v.

FRANCISCO L. BORGES, Treasurer
of the State of Connecticut, and
STATE OF CONNECTICUT,
Defendants-Appellants.

Before: NEWMAN, PIERCE, and MAHONEY,
Circuit Judges.

Appeal from a judgment of the District Court for the District of Connecticut (Alan H. Nevas, Judge) approving a magistrate's recommended ruling that Connecticut escheat law, as applied to uncollected checks for employee benefits, is preempted by the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001-1461 (1982 & Supp. IV 1986). *Aetna Life Insurance Co. v. Parker*, 692 F. Supp. 94 (D. Conn. 1988).

Reversed and remanded.

Carl J. Schuman, Asst. Atty. Gen., Hartford, Conn. (Joseph I. Lieberman, Atty. Gen., William J. Prensky, Asst. Atty. Gen., Hartford, Conn., on the brief), for defendants-appellants.

Allan B. Taylor, Hartford, Conn. (Ann McClure, Day, Berry & Howard, Hartford, Conn., on the brief), for plaintiff-appellee.

JON O. NEWMAN, Circuit Judge:

On this appeal, we once again confront the often litigated issue of the scope of federal preemption under the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §§ 1001-1461 (1982 & Supp. IV 1986). The question presented is whether ERISA preempts the application of Connecticut's escheat law to ERISA-covered benefit checks and drafts that have been issued but have not been collected or presented for payment by the beneficiaries. The Treasurer and the State of Connecticut appeal from a judgment of the District Court for the District of Connecticut (Alan H. Nevas, Judge) summarily approving a magistrate's recommended ruling that the escheat law is preempted. *Aetna Life Insurance Co. v. Parker*, 692 F. Supp. 94 (D. Conn. 1988). We reverse and remand.

Background

The stipulated facts are as follows. Appellee Aetna Life Insurance Company ("Aetna") contracts with employers to provide group health and accident insurance coverage to employees. The benefit plans at issue here are covered by ERISA, the federal law regulating pension and other employee benefit programs. The premium that Aetna charges to employers is based on each employer's "experience rating" -- that is, it is related to the cost of providing benefits to the employees of that company in previous years. The more benefits paid out under a plan, the higher the premium will be for the employer.

Not infrequently, after Aetna approves an employee's claim for benefits and issues a draft on an

Aetna account to pay the claim, the employee fails to present the draft for payment. The draft then remains on Aetna's records as outstanding. Aetna has no specific deadline for presenting uncollected drafts, but its policy has been to honor drafts for longer than three years.

Aetna generally calculates the experience rating of employers on the basis of checks presented for payment ("presented basis" accounting) rather than on all checks that have been issued ("issued basis" accounting). A small reserve to cover unpresented drafts that may be collected in the future is also figured into the calculation of premium cost, again based on the experience of the particular plan. The amount reserved is a small percentage of the total amount of all unpresented checks.

Most other insurers in Connecticut use issued basis accounting. To the extent that issued basis accounting may lead to higher premiums, Aetna enjoys a competitive marketing advantage over its competitors.

In 1981, Connecticut revised its abandoned property laws, changing the time period for abandonment from seven years to three years. Conn. Gen. Stat. § 3-64a (1987). After property is abandoned, the holder must deliver it to the state treasurer, and the holder is then relieved of liability for claims to the property. The owner has twenty years to file a claim for the property with the State. After twenty years, the State can begin escheat proceedings. Conn. Gen. Stat. § 3-72a.

Pursuant to the new law, the State determined that Aetna had uncollected drafts for ERISA-covered benefits totalling more than $2.5 million. The State instituted proceedings in state court to recover the money from Aetna. Aetna filed suit in the District Court for the District of Connecticut seeking an injunction and

a declaratory judgment that ERISA preempts the application of the escheat law to ERISA-covered benefit plans. Federal question jurisdiction was properly invoked. *See Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96 n.14 (1983). The parties stipulated to the facts and filed cross-motions for summary judgment.

Magistrate Joan Glazer Margolis wrote a recommended ruling that the escheat law was preempted, and Judge Nevas adopted the opinion. Judge Nevas entered judgment for Aetna on its prayer for declaratory relief and denied the claim for injunctive relief without prejudice.

The Magistrate's opinion determined that the escheat law is preempted because it has too great an impact on the administration of ERISA plans. The Magistrate noted that in a similar case, the Michigan Court of Appeals ruled that the State of Michigan's escheat law was not preempted by ERISA. *Attorney General v. Blue Cross & Blue Shield*, 168 Mich. App. 372, 424 N.W.2d 54 (1988). But the Magistrate believed that the factual record was not as fully developed in the Michigan case and that the impact on the administration of ERISA plans was not as clear.

Discussion

ERISA is a comprehensive statute designed to promote the interests of employees and their beneficiaries in employee benefit plans. *See Shaw v. Delta Air Lines, Inc., supra*, 463 U.S. at 90. The statute does not mandate that employers provide any particular benefits. But for employers that do provide certain pension and welfare benefits, ERISA imposes participation, funding, and vesting requirements, 29 U.S.C. §§ 1051-1086, and sets various uniform standards, including rules concerning reporting, disclosure, and fiduciary responsibility. 29 U.S.C. §§ 1021-1031, 1104-1114. The

statute does not prescribe any particular procedure for the handling of benefits that are awarded but uncollected, nor does it specify a time limit for honoring such claims.

The statute also includes an express preemption provision. Section 514(a) of ERISA provides that the statute "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan" covered by the statute. 29 U.S.C. § 1144(a).[1]

The purpose of Congress is the ultimate touchstone in determining whether a federal law preempts a state law. *Pilot Life Insurance Co. v. Dedeaux*, 107 S. Ct. 1549, 1552 (1987). We must seek to give effect to the "full purposes and objectives" of federal statutes. *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). At the same time, we must assume "that the historic police powers of the States were not to be superseded by [a] Federal Act unless that was the clear and manifest purpose of Congress." *Ray v. Atlantic Richfield Co.* , 435 U.S. 151, 157 (1978) (quotation omitted).

The Supreme Court has examined the scope of ERISA preemption on several occasions. The Court has stated that "the express pre-emption provisions of ERISA are deliberately expansive, and designed to 'establish pension plan regulation as exclusively a federal concern.'" *Pilot Life Insurance Co. v. Dedeaux, supra*, 107 S. Ct. at 1552 (quoting *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 523 (1981)). The words "relate to" in section 514(a) are to be interpreted broadly;

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[1] The statute also creates specific exceptions to this preemption provision for generally applicable criminal laws, 29 U.S.C. § 1144(b)(4), and laws that regulate insurance, banking, or securities, 29 U.S.C. § 1144(b)(2)(A), but neither of these exceptions are applicable to this case. Connecticut argued unsuccessfully in the District Court that its escheat law regulated insurance, but it has not renewed that argument on appeal.

ERISA does not preempt only state laws specifically designed to affect employee benefit plans or dealing with the subject matters covered by ERISA -- reporting, disclosure, fiduciary responsibility, and the like. *Shaw v. Delta Air Lines, Inc., supra*, 463 U.S. at 98.

The Supreme Court recently elaborated on the purposes of ERISA's preemption provisions:

> An employer that makes a commitment systematically to pay certain benefits undertakes a host of obligations, such as determining the eligibility of claimants, calculating benefit levels, making disbursements, monitoring the availability of funds for benefit payments, and keeping appropriate records in order to comply with applicable reporting requirements. The most efficient way to meet these responsibilities is to establish a uniform administrative scheme, which provides a set of standard procedures to guide processing of claims and disbursement of benefits. Such a system is difficult to achieve, however, if a benefit plan is subject to differing regulatory requirements in differing States. A plan would be required to keep certain records in some States but not in others; to make certain benefits available in some States but not in others; to process claims in a certain way in some States but not in others; and to comply with certain fiduciary standards in some States but not in others.

. . . .

> It is thus clear that ERISA's pre-emption provision was prompted by recognition that employers establishing and maintaining employee benefit plans are faced with the task of coordinating complex administrative activities. A patchwork scheme of regulation would introduce considerable inefficiencies in benefit program operation, which might lead those employers with existing plans to reduce benefits, and those without such plans to refrain from adopting them. Pre-emption ensures that the administrative practices of a benefit plan will be governed by only a single set of regulations.

Fort Halifax Packing Co. v. Coyne, 107 S. Ct. 2211, 2216-17 (1987).

The Court has also recognized, however, that Congress, in seeking to preempt all state laws that "relate to" employee benefit plans, could not possibly have meant to preempt all laws having any impact on such plans, no matter how small or how tangential. "Some state actions may affect employee benefit plans in too tenuous, remote, or peripheral a manner to warrant a finding that the law 'relates to' the plan." *Shaw v. Delta Air Lines, Inc., supra*, 463 U.S. at 100 n.21. *Shaw* cited as an example *American Telephone and Telegraph Co. v. Merry*, 592 F.2d 118, 121 (2d Cir. 1979), in which this Circuit held that ERISA did not preempt state garnishment of pension income to enforce alimony and support orders.

As we have stated before, the reason we cannot interpret ERISA as preempting state statutes whose effect on pension plans is tangential and remote is "a matter of common sense." *Rebaldo v. Cuomo*, 749 F.2d 133, 138 (2d Cir. 1984), *cert. denied*, 472 U.S. 1008 (1985).

> . . . ERISA plan members and managers are bound to engage in myriad transactions that Congress never considered when it drafted § 514. A preemption provision designed to prevent state interference with federal control of ERISA plans does not require the creation of a fully insulated legal world that excludes these plans from regulation of any purely local transaction.

Id. As we noted in *Rebaldo*, many state laws affect the cost and administration of pension plans: labor laws that govern working conditions and labor costs, rent control laws that determine what employee benefit plans pay or receive for rental property, and even highway and bridge tolls charged to plans' officers or employees. "[I]f ERISA is held to invalidate every State action that may increase the cost of operating employee benefit plans, those plans will be permitted a charmed existence that was never contemplated by Congress." *Id.* at 138-39.

Admittedly, the distinction between state laws that "relate to" employee benefit plans and those that have only a "tenuous, remote, or peripheral" impact is not always clear. One way to bring the distinction into focus is to compare the types of state laws that courts have found to be preempted with those that have survived challenge on preemption grounds.

State laws, or actions pursuant to state law, that have been preempted include: common law tort and

contract actions asserting improper processing of a claim for benefits under an ERISA-covered benefit program, *Pilot Life Insurance Co. v. Dedeaux, supra*, a law specifically exempting ERISA-covered benefits from a generally applicable state garnishment law, *Mackey v. Lanier Collections Agency & Service, Inc.*, 108 S. Ct. 2181, 2185 (1988); a law forbidding discrimination in employee benefit programs on the basis of pregnancy, *Shaw v. Delta Air Lines, Inc., supra*; and a law prohibiting offsets of worker compensation payments against pension benefits, *Allessi v. Raybestos-Manhattan, Inc., supra.*

State laws that have been ruled not preempted include: a generally applicable garnishment law under which creditors can garnish ERISA welfare benefits, *Mackey v. Lanier Collections Agency & Service, Inc., supra*, 108 S. Ct. at 2185- 91;[2] a law requiring companies to make lump-sum severance payments when closing a plant, *Fort Halifax Packing Co. v. Coyne, supra*; a law prescribing what hospitals can charge for in-patient care, thereby preventing benefit plans from negotiating their own discount rates with hospitals, *Rebaldo v. Cuomo, supra*; and a city income tax of general application that affects employee contributions to benefit plans, *Firestone Tire & Rubber Co. v. Neusser*, 810 F.2d 550 (6th Cir. 1987).

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[2] *Mackey* did not uphold the garnishment law on the ground that its effect was tangential. Rather, the Court found that Congress explicitly permitted ERISA plans to sue and be sued, implying that they must be subject to mechanisms to enforce judgments. The Court found no reason to assume that plan beneficiaries would not be subject to similar enforcement mechanisms. Although the Court's reasoning in *Mackey* does not apply to the case at bar, *Mackey* nonetheless provides an example of a state statute with an indirect effect on ERISA plans that the Court did not find inconsistent with ERISA.

Generalizing from these cases, we find that laws that have been ruled preempted are those that provide an alternative cause of action to employees to collect benefits protected by ERISA, refer specifically to ERISA plans and apply solely to them, or interfere with the calculation of benefits owed to an employee. Those that have not been preempted are laws of general application -- often traditional exercises of state power or regulatory authority -- whose effect on ERISA plans is incidental.

In *Rebaldo*, we further defined what constitutes incidental impact. We noted that indirect economic impact alone did not conflict with ERISA's aim of national uniformity in plan regulation because there is "no valid reason why employee benefit plans cannot be subject to nationally uniform supervision despite dissimilarities in their costs of doing business." 749 F.2d at 139. We said that where a state statute of general application "does not affect the structure, the administration, or the type of benefits provided by an ERISA plan, the mere fact that the statute has some economic impact on the plan does not require that the statute be invalidated." *Id.*

In focusing on the impact on "the structure, the administration, or the type of benefits provided by an ERISA plan," we did not mean that any impact in these areas, no matter how peripheral, was sufficient to trigger preemption. As with economic impact, many state laws of general application have some minimal, indirect impact on the administration of benefit plans, including laws that have been held not preempted.

In *Rebaldo* itself, for example, the state law we found not preempted precluded benefit plans from negotiating discount rates with hospitals, which would force plans to operate differently in that state than they might in other states. Similarly, the state garnishment law upheld in *Mackey*, allowing creditors to garnish

ERISA welfare benefits, would also require local adjustments in plan administration.

What triggers E .ISA preemption is not just any indirect effect on administrative procedures but rather an effect on the primary administrative functions of benefit plans, such as determining an employee's eligibility for a benefit and the amount of that benefit. In neither *Rebaldo* nor *Mackey* did the state law at issue affect the calculation of benefits.[3] In *Alessi v. Raybestos-Manhattan, Inc., supra*, on the other hand, the state law at issue "eliminate[d] one method for calculating pension benefits . . . that is permitted by federal law," *Id.* at 524, and for that reason was held preempted. Similarly, in *Gilbert v. Burlington Industries, Inc.*, 765 F.2d 320 (2d Cir. 1985), *aff'd*, 477 U.S. 901 (1986), we held that ERISA preempted a state severance pay law that would "determine whether any benefits are paid, and directly affect the administration of benefits under the plan." *Id.* at 327.[4] This is the kind of impact that would create a "patchwork scheme of regulation" among the several states, *Fort Halifax Packing Co. v. Coyne*, 107 S. Ct. at 2217, significantly interfering with the goal of ERISA to provide uniform, national regulation of benefit plans.

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[3] The state garnishment law in *Mackey* enables creditors to attach benefits after a plan determined the amount of benefits the employee was eligible to receive. It does not affect a plan's initial calculation of an employee's benefits.

[4] Another similar example is *MacLean v. Ford Motor Co.*, 831 F.2d 723 (7th Cir. 1987), which held that ERISA preempts state testamentary law to the extent that such law would require an ERISA plan to pay accumulated benefits to a testator's legatee, rather than to the beneficiary designated under the plan. The Seventh Circuit said, "When, as here, the terms of an employee pension plan under ERISA provide a valid method for determining the beneficiary, that mechanism cannot be displaced by the provision of a will." *Id.* at 728 (emphasis added).

Applying these principles to this case, we think that the impact of Connecticut's escheat law on ERISA benefit plans is too tenuous, remote, and peripheral to require preemption under section 514(a). The Connecticut law does not focus specifically on ERISA plans or benefits; it applies to lost or abandoned property generally. Indeed, escheat of abandoned property is an area of traditional state authority, *see Connecticut Mutual Life Insurance Co. v. Moore*, 333 U.S. 541, 547 (1948), exercised by virtually every state. See Unif. Unclaimed Property Act, Prefatory Note, 8A U.L.A. 617 (1983); *see generally* McThenia & Epstein, *Issues of Sovereignty in Escheat and the Uniform Unclaimed Property Act*, 40 Wash. & Lee L. Rev. 1429, 1430-33 (1983). In deference to state prerogatives within the federal system, we must not find such a traditional exercise of state power preempted unless the conclusion is "unavoidable." *Rebaldo v. Cuomo, supra*, 749 F.2d at 138.

Connecticut's escheat law has both an economic and administrative impact on ERISA plans. Aetna will have to pay all unclaimed benefits to the State after three years. We accept Aetna's contention that this will force it to include this cost in the experience rating of the employers it services, thus increasing the cost of providing benefits. Presumably that cost will ultimately be reflected in higher premiums for employers, lower benefits for employees, lower profits for Aetna, or some combination of these consequences. Aetna will also have to make administrative and accounting adjustments to comply with the law, adjustments that would be different in other states where the statutory time period for escheat differs.

These indirect economic and administrative effects are not substantial enough, however, to persuade us that this is the type of law Congress intended to preempt. The escheat law has no effect on Aetna's original determination of an employee's eligibility for benefits.

The indirect economic and administrative impact is of a kind similar to that of a garnishment law, which allows creditors to seize benefits before an employee ever receives them. For the employee the cash impact is far less: An escheat law at worst forecloses his opportunity for payment only after the state law claim period, here, twenty years; garnishment immediately precludes his receipt of money, though, of course, it reduces his indebtedness. Moreover, escheat poses no greater threat of inconsistency among state laws than does garnishment. Absent more specific direction from Congress, we can safely assume that Congress did not intend to create an exception to this traditional exercise of state authority.

Magistrate Margolis correctly noted that the fact that the escheat law involved the traditional exercise of state police power was not itself sufficient to vitiate ERISA's preemptive effect. *See Gilbert v. Burling Industries, Inc., supra*, 765 F.2d at 327. We disagree with her conclusion, however, that the indirect impact requires preemption.

The Magistrate noted three ways in which the escheat law would impact on Aetna's administration of ERISA plans: (1) it would have an economic impact, since Aetna would have to include claims escheated to the State in the experience rating of employers; (2) it would affect relations with principal ERISA entities, in that beneficiaries who did not claim their benefits for three years would thereafter have to seek payment from the State, rather than from Aetna; and (3) it would impose a different, more elaborate procedure on beneficiaries to collect their claim from the State, rather than presenting an uncollected draft for payment.[5]

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[5] The Magistrate also relied on the Eleventh Circuit's ruling in *Blue Cross & Blue Shield v. Department of Banking and Finance*, 791 F.2d 1501 (11th Cir. 1986), that a state escheat law was preempted by the preemption provisions of 5 U.S.C. § 8902(m)(1) (1982), which provides:

Accepting these factual findings, we nevertheless disagree that these effects are sufficient to trigger preemption. As discussed above, indirect economic impact alone is not sufficient. The intrusion in the relationship between Aetna and plan beneficiaries is no greater than that posed by the garnishment laws in *Mackey* and *Merry*.[6] Nor are the procedures for recovering claims held by the State so much more complex than the procedures for collecting a more than three-year-old draft as to require preemption.[7] Both procedures es-

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> The provisions of any contract under this chapter which relate to the nature or extent of coverage or benefits . . . shall supersede and preempt any State or local law, or any regulation issued thereunder, which relates to health insurance or plans to the extent that such law or regulation is inconsistent with such contractual provisions.

We do not think our conclusion that ERISA does not preempt Connecticut's escheat statute is inconsistent with the Eleventh Circuit's interpretation of section 8902(m)(1). Although the term "relates to" in that provision is similar to the broad "relate to" language of section 514(a) of ERISA, section 8902(m)(1) is much more narrowly targeted. It explicitly preempts state laws only to the extent that they are inconsistent with provisions of a federal contract. Thus, there is no need for the kind of implied exception for laws with only a tenuous or remote impact that the less focused ERISA provision demands.

[6] This is not to say that the impact of an escheat law could never be great enough to trigger preemption. For example, if state legislation required that all unclaimed drafts escheat to the state after one week, the impact on beneficiaries might be substantial enough to require preemption. But we do not think that Connecticut's three year period significantly impairs the rights of beneficiaries. Indeed, by providing that beneficiaries may collect their benefits from the State for up to twenty years, the statute may aid beneficiaries.

[7] We are not as certain as the Magistrate that it is a simple matter to present for payment a draft outstanding for a considerable length of time. The bank on which the draft was drawn would likely decline to

sentially involve a presentation of proper identification. The fact that the law requires the State to engage in extra paperwork and verification procedures does not necessarily increase the administrative burden on either plans or beneficiaries.

Aetna further contends that Connecticut's escheat law is preempted by section 502(a) of ERISA, which provides a federal cause of action for ERISA plan participants and beneficiaries to recover benefits due under the terms of an ERISA plan. 29 U.S.C. § 1132(a). The Supreme Court has held that section 502(a) is the exclusive vehicle for such actions and may not be supplemented by suits under state law. *See Pilot Life Insurance Co. v. Dedeaux, supra*, 107 S. Ct. at 1558. We do not find, however, that Connecticut's escheat law provides beneficiaries with an alternative cause of action for recovering benefits. The escheat law affects only the procedures for collecting benefits after a draft has already been issued. It does not provide a civil action governing the issuance of drafts in the first instance.

Conclusion

We hold that ERISA does not preempt Connecticut's escheat law as it applies to uncollected drafts for employee benefits. We therefore reverse the judgment of the District Court and remand for proceedings consistent with this opinion.

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honor it. It may be, however, that presentation to the drawer, here Aetna, results in somewhat more expeditious payment than presentation of a claim to the State under the escheat law.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

AETNA LIFE INSURANCE CO.	:	CIVIL NO. H-84-983(AHN)
v.	:	
HENRY PARKER, as Treasurer of the State of Connecticut, and STATE OF CONNECTICUT	:	DATE: MAY 23, 1988

ORDER

6/28/88. Over objection and after a careful review, the Magistrate's Recommended Ruling is hereby adopted, ratified and approved. SO ORDERED.

/s/
Alan H. Nevas, U.S.D.J.

RECOMMENDED RULING ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

On September 10, 1984, plaintiff Aetna Life Insurance Company ("plaintiff" or "Aetna") brought this action for injunctive and declaratory relief pursuant to Section 502(a)(3) of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1132(a)(3); in its second amended complaint, filed December 24, 1986, plaintiff contends that the defendants State of Connecticut ("Connecticut" or "State") and its state

treasurer have improperly demanded surrender under Connecticut's escheat statute, Conn. Gen. Stat. §§ 3-64a,[1] of more than $2,500,000 in uncashed checks and drafts issued in payment of individual benefits under ERISA plans. In their counterclaim, filed April 3, 1987, defendants assert that the unclaimed drafts constitute abandoned property to which they are entitled under the state escheat statute.

A Joint Stipulation of Facts ("Jt. Stip.") was filed on December 15, 1987. On January 15, 1988, defendants filed a motion for summary judgment; plaintiff's cross-motion for summary judgment was filed on January 19, 1988.[2] Reply briefs were filed on January 29, 1988. Lengthy oral argument was held on April 8, 1988. The sole legal issue raised here is whether the Connecticut escheat statute is preempted by ERISA.

For the reasons stated herein, plaintiff's motion for summary judgment is granted and accordingly defendants' motion for summary judgment is denied.

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[1] Conn. Gen. Stat.§ 3-64a is one of several statutes concerning escheat or property to the State. *See* Conn. Gen. Stat. §§ 3-56a to 74a. Section 3-64a provides in full:

> All property not otherwise provided for or excluded from this part, including any income, interest or other increment thereto and deducting any lawful charges, which is held or owing in this state and has remained unclaimed by the owner for more than three years after it became due, payable or distributable , is presumed abandoned.

[2] Plaintiff's Local Rule 9(c) Statement incorporates the Stipulation of Facts in its entirety. Defendants' Local Rule 9(c) Statement incorporates all but §§ 34 and 39. Accordingly, the Court will not consider these latter two paragraphs.

I. FACTS

The following facts are undisputed:

Plaintiff Aetna provides group and accident insurance to various employee benefit plans, some of which are subject to ERISA. (Jt. Stip. ¶ 3).

On April 8, 1982, Aetna entered a settlement agreement with the State in the amount of $7,131,772.71 regarding escheatment of Aetna's statutory obligations through 1981, including drafts issued under ERISA plans prior to ERISA's effective date. (Jt. Stip. ¶ 37, Exh. A). Aetna charged these amounts to ERISA and non-ERISA plans equally. (Jt. Stip. ¶ 38). For drafts issued subsequent to the period covered by the settlement, Aetna now charges escheatable amounts directly to the plan under which the amounts arose. (Jt. Stip. ¶ 39). All outstanding drafts issued under life insurance policies prior to 1983 have been surrendered to the State regardless of the ERISA status of those policies. (Jt. Stip. ¶ 40). The parties agree that more than $2,500,000 in claim payment drafts issued by Aetna under ERISA plans prior to January 1, 1985 remain outstanding. (Jt. Stip. ¶ 33).

Aetna determines the amount of the premium it charges to the members of each insured group by an accounting procedure called "experience rating." (Jt. Stip. ¶ 8). Aetna bases premiums for the ensuing year on the amount actually paid in claims to members of that group during the previous year. (Jt. Stip. ¶ 8). Aetna does not include a claim from the previous year into its loss experience until the claim payment draft has cleared banking channels ("presented basis accounting"). (Jt. Stip. ¶ ¶ 10, 17). Only pharmacy and repetitive payment claims are charged to the appropriate plan at the time the drafts are issued ("issued basis accounting"). (Jt. Stip. ¶ ¶ 41, 18). Most of

Aetna's competitors use "issued basis accounting" for all claims paid to the various insured groups. (Jt. Stip. ¶ 19).

Unrecoverable losses are also figured into the experience rating formula, while experience surpluses are either refunded or credited to the policyholder. (Jt. Stip. ¶ ¶ 11, 13). Deficits are recovered from future premiums. (Jt. Stip. ¶ 13).

When Aetna's payment for covered services does not clear banking channels during the policy year, Aetna sets aside a reserve fund for payment of these claims based upon the group's claims history. (Jt. Stip. ¶ 10). The company honors such unpaid drafts even when they are over three years old. (Jt. Stip. ¶ 10).

When an ERISA plan is cancelled or terminated, Aetna continues to pay claims submitted under the plan in the usual manner after a period of two years. (Jt. Stip. ¶ 29). Two years after the plan ends, the company returns reserve funds to the Plan, but it deducts a 2% residual for unrecorded claims which may subsequently be presented under the terminated plan. (Jt. Stip. ¶ 14). Once final accounting has taken place, about two years after cancellation of a plan, Aetna no longer charges the plan for outstanding drafts subsequently presented for payment. (Jt. Stip. ¶ 29).

By the terms of its contracts with policyholders, Aetna may set the experience credit amount. (Jt. Stip. ¶ 22). On occasion, Aetna has negotiated the amount with ERISA plans and has made adjustments to prevent policyholders from terminating or cancelling their policies. (Jt. Stip. ¶ ¶ 23, 24).

The limitations of Aetna's previous filing system prevent identification of the specific ERISA plans or payees to whom outstanding claim drafts issued prior to

January 1, 1982 should be charged. (Jt. Stip. ¶ 25). Aetna did not attempt to contact those ERISA draft payees. (Jt. Stip. ¶ 26). Aetna also does not know which outstanding drafts for January 1, 1975 through December 31, 1983 were issued under ERISA plans and under non- ERISA plans. (Jt. Stip. ¶ 33). However, it sent contact letters to payees of outstanding drafts of over $250 issued during 1982 and to payees of drafts over $100 issued in 1983 or later, regardless of ERISA status. (Jt. Stip. ¶ 26). Aetna does not seek payees of outstanding drafts through publication. (Jt. Stip. ¶ 27). It has no record of which ERISA plans have been terminated or cancelled. (Jt. Stip. ¶ 28).

Aetna could not apply any loss due to funds escheated by the state to premium increases for ERISA plans cancelled or terminated prior to November 1, 1984 because it cannot charge a plan's loss experience with funds paid out more than two years after cancellation or termination of the plan. (Jt. Stip. ¶¶ 30,31).

II. DISCUSSION

A. PREEMPTION

Section 514(a) of ERISA explicitly provides that the provisions of ERISA "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan" under ERISA. 29 U.S.C. § 1144(a). As the United States Supreme Court stated in *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 523 (1981)("*Alessi*"), § 1144(a) was "meant to establish pension plan regulation as exclusively a federal concern." (footnote omitted). The *Alessi* Court drew upon the definition of "State" found in 29 U.S.C. § 1144(c)(2)[3] to hold that "even indirect state action bearing

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[3] This section reads in full:

upon private pensions may encroach upon the exclusive federal concern." *Id.* at 525.

Section 1144(a) was given an equally broad construction in *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85 (1983) ("*Shaw*"). There the Court quoted from legislative testimony that ERISA was

> . . . intended to preempt the field for Federal regulations, thus eliminating the threat of conflicting or inconsistent State and local regulation of employee benefit plans. This principal is intended to apply in its broadest sense to all actions of State or local governments, or any instrumentality thereof, which have the force or effect of law.

Id. at 99, quoting 120 Cong. Rec. 29933 (1974). Thus the Court ruled that the "breadth of [§ 1144(a)'s] pre-emptive reach is apparent from that section's language." 463 U.S. at 96 (footnote omitted). It further held that a law "relates to" an ERISA plan "in the normal sense of the phrase, if it has a connection with or reference to such a plan." *Id.* at 97 (footnote omitted). The Supreme Court later stated that *Shaw* gave this phrase a "broad common-sense meaning." *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 739 (1985) ("*Metropolitan v. Massachusetts*").

The term "State" includes a State, any political subdivision thereof, or any agency or instrumentality of either, which purports to regulate, directly or indirectly, the terms and conditions of employee benefit plans covered by this subchapter.

While recognizing that the *Shaw* court accorded § 1144(a) a broad and liberal construction, the Second Circuit nonetheless characterized the preemptive scope of ERISA as "neither all-encompassing . . . nor unlimited . . ." *Rebaldo v. Cuomo*, 749 F.2d 133, 138 (2d Cir. 1984), *cert. denied*, 472 U.S. 1008 (1985)(citations omitted)("*Rebaldo*"). Like the Supreme Court in *Alessi*, the Second Circuit referred to § 1144(c)(2), which defines the term "State,"[4] to restrict the preemptive effect of ERISA to only those state laws which "purport[] to regulate, . . . the terms and conditions of employee benefit plans . . ." [5]

As defendants appropriately point out, escheat of unclaimed property is an area of traditional state control, rooted in English common law and adopted in this country after the American Revolution. (Defendants' Brief at 9-10). Indeed, the Second Circuit on two occasions found no preemption by ERISA of two New York statutes which involved the exercise of the state's police powers. *E.g., Rebaldo, supra*, 749 F.2d at 138-40 (statute directed to containment of hospital costs); *American Telephone & Telegraph Co. v. Merry*, 592 F.2d 118, 122 (2d Cir. 1979)("*Merry*")(state domestic relations

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[4] See note 3 *supra*.

[5] Only the Second Circuit and the Ninth Circuit have suggested that § 1144(c)(2) limits the preemptive scope of § 1144(a). *See also Martori Bros. Distributors v. James-Massengale*, 781 F.2d 1349, 1359 (9th Cir.), *amended on other grounds*, 791 F.2d 799 (9th Cir.), *cert. denied*, 107 S. Ct. 435 (1986). The Sixth Circuit expressed disapproval of this analysis but declined to rule upon it in *Arthiur v. Ginsburg*, 757 F.2d 796, 799 n.4 (6th Cir.) *cert. denied*, 474 U.S. 888 (1985). The Fifth Circuit similarly expressed no opinion on this issue in *Sommers Drug Stores Co. Employee Profit Sharing Trust v. Corrigan Enterprises, Inc.*, 793 F.2d 1456, 1467 n.9 (5th Cir.), *reh. denied en banc*, 797 F.2d 977 (5th Cir. 1986), *cert. denied sub nom. Corrigan v. Sommers Drug Stores Co.*, 107 S. Ct. 884, *cert. denied sub nom. Sommers Drug Stores Co. Employee Profit Sharing Trust v. Corrigan* , 107 S. Ct. 1298 (1987).

statute)(cited with approval in *Shaw*, *supra*, 463 U.S. at 100 n.21). However, that factor in and of itself appears insufficient to vitiate ERISA's preemptive effect. *See*, *e.g.*, *Alessi*, *supra* (workers' compensation statute); *Gilbert v. Burlington Industries, Inc.*, 765 F.2d 320, 326-28 (2d Cir. 1985), *aff'd mem. sub. nom. Roberts v. Burlington Industries, Inc.*, 477 U.S. 901 (1986) ("*Gilbert*")(New York wage collection statutes); *Stone & Webster Engineering Corp. v. Ilsley*, 690 F.2d 323, 328-30 (2d Cir. 1982), *aff'd mem. sub nom. Arcudi v. Stone & Webster Engineering Corp.*, 463 U.S. 1220 (1983) ("*Stone & Webster*")(Connecticut workers' compensation statute); *Bartucca v. Kay Industries, Inc.*, 668 F. Supp. 111, 113-14 (D. Conn. 1987)(Connecticut wage collection statutes).

Defendants here emphasize that the Connecticut escheat statute is too remotely related to an ERISA plan to be preempted under § 1144(a). Defendants rely upon the Supreme Court's cautionary language, in a footnote in *Shaw*, that "[s]ome state actions may affect employee benefit plans in too tenuous, remote, or peripheral a manner to warrant a finding that the law 'relates to' the plan." 463 U.S. at 100 n.21. This was a significant factor, among others,[6] in the *Rebaldo* decision, where the Second Circuit ruled that ERISA does not preempt a New York statute which limited a hospital's ability to set inpatient charges for self-insured employee benefit plans, as such statute did not "relate" to the terms and conditions of employee benefit plans:

> ERISA does not invalidate those State statutes whose effect on pension plans is simply tangential in nature. . . . This conclusion follows as a matter of common

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[6] *See* text accompanying notes 4-5 *supra*.

> sense from the fact that ERISA plan members and managers are bound to engage in myriad transactions that Congress never considered when it drafted [§ 1144(a)]. A preemption provision designed to prevent state interference with federal control of ERISA plans does not require the creation of a fully insulated legal world that excludes these plans from regulation of any purely local transaction.

749 F.2d at 138 (citations omitted). As the Second Circuit observed, state and municipal regulation of zoning, health, and safety matters also affect the operations of ERISA trusts, but such regulations clearly are not pre-empted by ERISA. *Id., quoting Lane v. Goren*, 743 F.2d 1337, 1340 (9th Cir. 1984) ("*Lane*").

In *Sommers Drug Stores Co. Employee Profit Sharing Trust v. Corrigan Enterprises, Inc.*, 793 F.2d 1456, 1465-67 (5th Cir.), *reh. denied en banc*, 797 F.2d 977 (5th Cir. 1986), *cert. denied sub nom. Corrigan v. Sommers Drug Stores Co.*, 107 S. Ct. 884, *cert. denied sub nom. Sommers Drug Stores Co. Employee Profit Sharing Trust v. Corrigan*, 107 S. Ct. 1298 (1987) ("*Sommers*"), the Fifth Circuit reviewed numerous appellate decisions construing this "remoteness" exception, including *Merry*, *Rebaldo*, *Gilbert* and *Lane*. The Fifth Circuit analyzed this line of cases as follows:

> These cases are not easily distilled into a simple test for determining whether a state law of general application affects employee benefit plans in too tenuous, remote, or peripheral a manner to be preempted. The courts appear to

> consider two principal facts. First, if the state law involves an exercise of traditional state authority, then the courts are less likely to find that it relates to a benefit plan than if it involves a state attempt to regulate an area not traditionally left to the states....
>
> Second, the courts are more likely to find that a state law relates to a benefit plan if it affects relations among the principal ERISA entities -- the employer, the plan, the plan fiduciaries, and the beneficiaries -- than if it affects relations between one of these entities and an outside party, or between two outside parties with only an incidental effect on the plan....

793 F.2d at 1467 (citations omitted).

In addition to these two factors identified by the Fifth Circuit in *Sommers*, the Second Circuit in *Rebaldo* placed a further emphasis on whether the state law had a direct economic impact on the administration of the ERISA plan. The court reasoned that all state interaction with economic activity, whether in the areas of public utility services, minimum wage regulation, rent control, and highway tolls, has some economic impact upon ERISA plans. 749 F.2d at 138. But, the court continued:

> . . . if ERISA is held to invalidate every State action that may increase the cost of operating employee benefit plans, those plans will be permitted a charmed existence that

> never was contemplated by Congress. Where, as here, a State statute of general application does not affect the structure, the administration, or the type of benefits provided by an ERISA plan, the mere fact that the statute has some economic impact on the plan does not require that the statute be invalidated.

Id. at 138-39 (footnote omitted). *Rebaldo* was distinguished in *Gilbert*, in the latter decision concerned determination of whether any benefits were paid, and thus "directly affect[ed] the administration of benefits under the plan." 765 F.2d at 327. *See also Sforza v. Kenco Constructional Contracting, Inc.*, 675 F. Supp. 1493, 1494 n.4 (D. Conn. 1986) ("Sforza") (explaining that the Second Circuit "clarified its position" on this issue in *Gilbert*).

This distinction was one of several significant factors in *Fort Halifax Packing Co. v. Coyne*, 107 S. Ct. 2211 (1987) ("*Fort Halifax*"), concerning a Maine statute which required employers to provide a one-time severance payment to employees upon the closing of a plant. Since the Maine statute required a one-time payment, the state law did not impact upon the administration of an ERISA plan. As the Court explained:

> It is . . . clear that ERISA's pre-emption provision was prompted by recognition that employers establishing and maintaining employee benefit plans are faced with the task of coordinating complex administrative activities. A patchwork scheme of regulation would

> introduce considerable inefficiencies in benefit program operation, which might lead those employers with existing plans to reduce benefits, and those without such plans to refrain from adopting them. Pre-emption ensures that the administrative practices of a benefit plan will be governed by only a single set of regulations....

Id. at 2217 (citation omitted). *See also Totton v. New York Life Ins. Co.*, Civ. No. N87-244(PCD) (D. Conn. Mar. 31, 1988) (in post-*Fort Halifax* decision, plaintiffs' state breach of contract claim held not to be pre-empted by ERISA, as such claim did not impact upon administration of the ERISA plan).

In applying these analyses to the undisputed facts and legal issues here, it would appear that under these circumstances, the Connecticut escheat statute has been preempted by ERISA. There can be no doubt that the escheat of unclaimed property is an area of traditional state control and has been since this nation's inception. However, if the uncashed checks and drafts were escheated to the State, the escheat statute would affect relations with principal ERISA entities, namely the beneficiaries who would now be directed to the State to seek payment, since the state becomes responsible for a claim upon payment or delivery of excepted money or property to the treasurer. Conn. Gen. Stat. §§ 3-62g & -67a. The Connecticut escheat statutes set forth an elaborate procedure by which a person makes a claim for return of escheated property. The process is commenced by filing a verified petition with the state treasurer, who may hold hearings himself or may refer the matter to the claims commissioner for his recommendation. Conn. Gen. Stat. §§ 3-62f(a), (b) & 3-70(b). The treasurer must issue a written decision with

findings of fact and a statement of reasons; no claims are to be paid without written approval of the attorney general. Conn. Gen. Stat. §§ 3-62f(b) & 3-70a(b), (c). Any person aggrieved by the state treasurer's decision may file an appeal in the superior court in the judicial district of Hartford-New Britain, in accordance with Conn. Gen. Stat. § 4-183. Conn. Gen. Stat. §§ 3-62f(b) & 3-72(a). The court may impose double or triple costs against the claimant, if the appeal was taken without probable cause. Conn. Gen. Stat. §§ 3- 67f(b) and 3-71(a). Thus, application of the escheat statute would have a direct effect upon the administration of benefits under the various ERISA plans. And lastly, given the magnitude of the sums at dispute here, there will be a direct economic impact on the administration of ERISA plans, unlike in *Rebaldo*. Defendants are correct that many of the underlying ERISA plans have been terminated, so that presentment of outstanding drafts would have no immediate impact on an employer's "experience rating." However, even with respect to cancelled or terminated plans, plaintiff maintains reserve or residual funds for a specified period of time. And most significantly, as plaintiff's counsel indicated at oral argument, were the escheat statute to apply, plaintiff would switch from presented basis accounting to issued basis accounting, which could have an adverse impact upon insurance premiums for all ERISA plans.

An analogous issue was presented in *Blue Cross & Blue Shield of Florida, Inc. v. Department of Banking & Finance*, 791 F.2d 1501 (11th Cir.), *reh. denied en banc*, 797 F.2d 982 (11th Cir. 1986), involving a federal employees' health benefit program, coordinated on a nationwide basis by the plaintiff insurance company. The State of Florida demanded that all checks issued to beneficiaries under the plan which remained uncashed for seven years escheat to the State, under its Unclaimed Property Act. The federal Office of Personnel Management ("OPM") contrarily argued that the state

law was pre-empted by virtue of 5 U.S.C. § 8902(m)(1), which provides that any federal health benefit contract

> which relate[s] to the nature or extent of coverage or benefits (including payments with respect to benefits) shall supersede and preempt any State or local law . . . which relates to health insurance or plans to the extent such law or regulation is inconsistent with such contractual provisions.

In order to resolve this dispute, plaintiff commenced an interpleader action, the central question being whether the Florida escheat statute was one "which relate[d] to health insurance or plans." The Eleventh Circuit relied primarily upon the *Shaw* decision, as it saw "no meaningful difference on the face of the statute between Congress' use of 'relates to' in ERISA and its use of the same words in section 8902(m)." 791 F.2d at 1504. The Eleventh Circuit gave "great deference" to the OPM's reasonable conclusion that the state unclaimed property law "relate[d] to" health insurance or plans, over the contentions of the state defendants that such relation was too "remote." *Id.* at 1505-06. Thus, the court held that the Florida escheat statute was preempted by the federal contract. *Id.* at 1506.[7]

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[7]On May 9, 1988, after this recommended ruling already was in draft, defense counsel forwarded to the Magistrate copies of two recent unreported decisions. Plaintiff's counsel forwarded a letter in response on May 13, 1988. The first, and more significant, decision was *Attorney General v. Blue Cross & Blue Shield of Michigan*, No. 96,788 (Mich. Ct. App. May 2, 1988), in which the court held, on pages 7-8, that ERISA does not preempt the Michigan escheat law, relying primarily upon *Rebaldo, supra.* As plaintiff's counsel correctly points out, the factual record there was not as well developed as that here, where a direct impact upon the administration of ERISA plans is clear.

Accordingly, given the totality of the pertinent factors, this court finds that to the extent defendants seek entitlement to more than $2,500,000 in uncashed checks and drafts issued by plaintiff in payment of individual benefits under ERISA plans, the Connecticut escheat statute, Conn. Gen. Stat. § 3-64a, is preempted by ERISA.

B. INSURANCE SAVINGS CLAUSE

Defendants further suggest that even if preemption were appropriate under § 1144(a), the state statute would fall under the "insurance saving clause" found in § 1144(b)(2)(A), which provides that ". . . nothing in this subchapter shall be construed to exempt or relieve any person from, any law of any State which regulates insurance, banking or securities."

The insurance saving clause was at issue in *Metropolitan v. Massachusetts, supra*, which involved a Massachusetts statute requiring specified minimum mental-health benefits in certain insurance policies. These two pre-emption statutes, the Court wrote, "while clear on their faces, perhaps are not a model of legislative drafting . . ." 105 S. Ct. at 2389. The Court adopted the three-part test utilized to construe the phrases "business of insurance" under the McCarran-Ferguson Act, 15 U.S.C. § 1011 *et seq.*:

In the second decision, *National Elevator Industry Pension, Welfare & Educational Funds v. Scrivani* Dkt., No. 241175 (Conn. Super. Ct. Feb. 8, 1988), a Connecticut Superior Court judge held that a claim under the Connecticut Unfair Trade Practices Act against a corporate officer and shareholder who failed to make contributions to a pension fund was not preempted by ERISA, again relying primarily upon *Rebaldo, supra*. As plaintiff's counsel appropriately argues, the *Scrivani* ruling appears to be in conflict with *Sforza, supra*, in which Judge Nevas found that ERISA preempts a Connecticut statute which imposes civil and criminal liability on corporate officers who fail to make required pension payments. 629 F. Supp. at 490-92.

> first, whether the practice has the effect of transferring or spreading a policy holder's risk; second, whether the practice is an integral part of the policy relationship between the insurer and the insured; and third, whether the practice is limited to entities within the insurance industry.

Id. at 2391, *quoting Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119, 129 (1982)(emphasis in original). The Supreme Court found that all three elements were met, so that the mandated-benefit law was "saved from pre-emption by the operation of the saving clause." 105 S. Ct. at 2391-92 (footnote omitted). The Court further rejected the insurance company's claim that the saving clause was entitled to a narrow construction. *Id.* at 2392-93.

Application of the three-part test led to a different result, however, in *Pilot Life Ins. Co. v. Dedeaux*, 107 S. Ct. 1549, 1554-55 ("*Pilot Life*"), involving a plaintiff's state law claim of bad faith against any insurance company. The Court reviewed the various contexts in which this claim had been applied in the Mississippi courts and found that a "common-sense understanding of the phrase 'regulates insurance' does not support the argument that the Mississippi law of bad faith falls under the savings clause." *Id.* at 1554. Thus the Court held that this state claim was pre-empted under § 1144(a). *Id.* at 1558. *See also Northern Group Services, Inc. v. Auto Owners Ins. Co.*, 833 F.2d 85, 89-90 (6th Cir.), *reh. denied en banc sub. nom Northern Group Services, Inc. v. State Farm Mut. Auto Ins. Co.*, 9 E.B.C. 1376 (6th Cir. 1984) (coordination of benefits section of Michigan No-Fault Automobile Insurance Act "clearly" "regulates insurance"; *General Motors Corp. v. California State Board of Equalization*, 815 F.2d 1305,

1310 (9th Cir.) *reh. denied*, 824 F. 2d 816 (9th Cir. 1987), *cert. denied sub nom. General Motors Corp. v. Bennett*, 108 S. Ct. 1122 (1988) (state law on gross premiums received by insurance companies doing business in California is within purview of insurance saving clause, as such tax is "intimately associated with the business of insurance").

None of the three factors set forth in *Metropolitan v. Massachusetts, supra*, are applicable here -- the escheat statute does not have the effect of transferring or spreading a policyholder's risk, it is not an integral part of the policy relationship between the insurer and the insured, and it is not limited to entities within the insurance industry. The escheat statutes apply to a variety of circumstances -- property held by banking organizations, Conn. Gen. Stat. § 3-57a; funds held by life insurance corporations, Conn. Gen. Stat. § 3-58a; property held by or ownership in a business association, Conn. Gen. Stat. §§ 3-59a & -59b; property distributable on dissolution of business, Conn. Gen. Stat. § 3-60; property held by fiduciaries, Conn. Gen. Stat. § 3-61a; property held by public bodies or officers, Conn. Gen. Stat. § 3-62a; property held by federal courts or agencies, Conn. Gen. Stat. § 3-62b; property in decedent's estates, Conn. Gen. Stat. § 3-63a; and unclaimed intangible property, Conn. Gen. Stat. § 3-65a. The statute at question here, Conn. Gen. Stat. § 3-64a,[8] has been applied to the escheat of shares of public utility holding company stock and dividends. *See Matter of Northeast Utilities*, 479 F. Supp. 194 (D. Conn. 1979). Thus, as in *Pilot Life, supra*, a common-sense understanding of the phrase "regulates insurance" leads to the conclusion

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[8] *See* note 1 *supra*.

that the Connecticut escheat law does not fall under the insurance saving clause.[9]

III. CONCLUSION

For the reasons stated above, plaintiff's motion for summary judgment is granted and defendants' motion for summary judgment is denied.

See 28 U.S.C. Section 636(b)(written objections to ruling must be filed within ten days after service of same); F. R. Civ. P. 72; Rule 2 of the Local Rules for United States Magistrates, United States District Court for the District of Connecticut.

Dated at New Haven, Connecticut this 23rd day of May, 1988.

/s/
Joan Glazer Margolis
United States Magistrate

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[9] In light of the conclusions reached in Parts II.A. & B., there is no reason to reach the other issues raised by the parties.

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

AETNA LIFE INSURANCE COMPANY	:	
v.	:	Civil No. H-84-983(AHN)
HENRY PARKER, as Treasurer of the State of Connecticut, and STATE OF CONNECTICUT	:	Filed: March 9, 1987

RULING ON MOTION TO DISMISS AND/OR IN THE ALTERNATIVE FOR SUMMARY JUDGMENT

Plaintiff is the Aetna Life Insurance Company ("Aetna"). Aetna provides health and accident coverage for beneficiaries of various welfare plans which are subject to regulation by the Employee Retirement Income Act ("ERISA").[1] Defendants are Henry Parker as Treasurer of the State of Connecticut[2] and the State of Connecticut (jointly, "the state"). In bringing this action, Aetna seeks to test the preemptive powers of ERISA. Specifically, Aetna seeks a declaratory judgment pursuant to the Declaratory Judgment Act, 28 U.S.C. Section 2201 that ERISA preempts Connecticut's abandoned property law[3] and, therefore, the state has no right to claim, as abandoned property, the proceeds of

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[1] 29 U.S.C. Section 1001 *et seq.*

[2] Mr. Parker is no longer Treasurer of the State of Connecticut. The new Treasurer is Francisco L. Borges.

[3] Conn. Gen. Stat. Sections 3-64a and 3-65a.

uncashed benefit checks written by Aetna for ERISA Plan beneficiaries. The state now moves for dismissal and/or in the alternative for summary judgment on its abstention claim. For the reasons that follow, the state's motion is denied.

Facts

A number of employee welfare plans which are subject to regulation by ERISA ("ERISA plans") have contracts with Aetna pursuant to which Aetna provides group health and accident insurance for beneficiaries of the ERISA plans. Although the contracts vary from plan to plan, they generally provide that when a beneficiary files a claim for benefits under a plan policy, Aetna undertakes an investigation and then either pays or denies the claim. In paying claims, Aetna issues a check payable to the beneficiary. When the check is cashed, Aetna charges the ERISA plan either through a premium increase or by reducing experience rating credits. No charge is made to the plan, however, until the check is cashed by the beneficiary. Occasionally, when Aetna issues a check to a beneficiary in payment of a claim, the beneficiary, for unknown reasons, fails to cash the check. In that situation, Aetna simply retains the proceeds and does not charge the plan.

In 1981, the Connecticut legislature amended the state's abandoned property laws. The amendments broadened the definition of abandoned property and expanded the reporting requirements of holders of abandoned property. *See* P.A. 81-1 (Nov. Sp. Sess.). Pursuant to the amended laws, the state, acting by its Treasurer, commenced an examination of Aetna's records to determine whether Aetna held any abandoned property. As a result of this investigation, the state learned that Aetna was holding the proceeds from uncashed ERISA plan benefit checks. These proceeds now total more than $2,500,000.

On August 21, 1984, the state commenced an action in state court seeking to recover from Aetna, as abandoned property, funds representing the proceeds of all checks which had remained uncashed by ERISA beneficiaries for three or more years. In the state court proceeding, Aetna claimed that ERISA preempts Connecticut's abandoned property law and therefore, the state had no right to this money. However, before this issue could be argued in state court, Aetna filed this action for a declaratory judgment.

In this "motion to dismiss and/or in the alternative for summary judgment on the claim of abstention," the state first argues that Aetna is not a fiduciary under ERISA and that Aetna thus lacks standing to invoke this court's jurisdiction. Next, in the summary judgment portion of the argument, the state argues that even if Aetna is a fiduciary, the court should abstain from hearing this case on the basis of *Younger*[4] abstention. In response to the state's motion, Aetna asserts that it is a fiduciary, at least for the limited purpose of paying and denying claims by beneficiaries. Aetna further asserts that even if it is not a fiduciary it has a right to bring this action under the court's federal question jurisdiction. Finally, Aetna asserts that because federal courts have exclusive jurisdiction over ERISA actions brought pursuant to 29 U.S.C. Section 1132(a)(3), abstention is inappropriate.[5]

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[4] *Younger v. Harris*, 401 U.S. 37 (1971).

[5] The issues raised by the state in this motion are by no means novel. The Second Circuit squarely faced these same issues in *Stone & Webster Engineering v. Ilsley*, 690 F.2d 323, 326-329 (2d Cir. 1982). Accordingly, the court spends little time in addressing the state's arguments.

Jurisdiction

In an action for a declaratory judgment, a court must have a basis of jurisdiction other than the Declaratory Judgment Act. The Declaratory Judgment Act, while expanding the range of remedies available in federal court, does not by itself confer jurisdiction on a federal court. *Skelly Oil v. Phillips Petroleum Co.*, 339 U.S. 667, 671-72 (1950); *Stone & Webster Engineering v. Ilsley*, 690 F.2d 323, 327 (2d Cir. 1982), *aff'd sub nom. Arcudia v. Stone & Webster Engineering Corp.*, 463 U.S. 1220 (1983). *See also* 10A C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure: Civil 2d* Section 2766 pp. 731-32 (1983). In this case, Aetna alleges jurisdiction under 28 U.S.C. Section 1331 (federal question) and 29 U.S.C. Section 1132(a)(3)(ERISA). In moving to dismiss, the state correctly notes that only participants, beneficiaries, or fiduciaries may invoke this court's jurisdiction under Section 1132(a)(3). The state argues that while Aetna alleges that it is an ERISA fiduciary in paragraph 5 of its complaint, Aetna is not, in fact, a fiduciary and therefore it may not bring this action. The parties have spent a great deal on the questions of whether Aetna is a fiduciary, whether Aetna is a fiduciary for a limited purpose, and whether the limited purposes for which Aetna is a fiduciary are adequate or not. While these arguments have been quite interesting and informative to the court, they are irrelevant.

Aetna's complaint alleges jurisdiction under this court's federal question jurisdiction as well as under its ERISA jurisdiction. It has been held that where a party seeks a judgment declaring that a federal statute preempts state law, federal question jurisdiction is properly invoked. *Stone & Webster Engineering*, 690 F.2d at 327. *See also Bd of Electric Light Commissioners of the City of Burlington v. McCarren*, 725 F.2d 176, 178 (2d Cir. 1983); *Housatonic Cable Vision Company v.*

Dept. of Public Utility Control, 622 F. Supp. 798, 803 (D. Conn. 1985) (Blumenfeld, J.). Inasmuch as Aetna seeks a declaration that ERISA preempts Connecticut's abandoned property law, regardless of whether or not Aetna is an ERISA fiduciary, this court has jurisdiction under 28 U.S.C. Section 1331. Accordingly, the court finds the state's motion to dismiss for lack of subject matter jurisdiction to be without merit.

Abstention

The state's motion for summary judgment on its abstention claim is equally meritless. The Second Circuit has held that "[a]bstention . . . under the doctrine of *Younger v. Harris*, 401 U.S. 37 (1971) is not appropriately invoked in a preemption case." *Stone & Webster Engineering*, 690 F.2d at 326 n.2 (*citing Marshall v. Chase Manhattan Bank*, 558 F.2d 680, 683-84 (2d Cir. 1977). Accordingly, the state's motion for summary judgment on its abstention claim must be denied.

Conclusion

For the foregoing reasons the state's motion to dismiss and/or in the alternative for summary judgment is denied. The parties are ordered to appear before the court for a status conference on March 18, 1987, at 9:00 a.m.

SO ORDERED this 9th day of March, 1987, at Hartford, Connecticut.

/s/
Alan H. Nevas
United States District Judge

UNITED STATES COURT OF APPEAL

FOR THE

SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-third day of February one thousand nine hundred and eighty-nine.

Present: HON. JON O. NEWMAN

HON. LAWRENCE W. PIERCE

HON. J. DANIEL MAHONEY

Circuit Judges,

AETNA LIFE INSURANCE COMPANY, Plaintiff-Appellee,	:	
v.	:	Docket No. 88-7843
FRANCISCO L. BORGES, Treasurer of the State of Connecticut, and STATE OF CONNECTICUT, Defendants-Appellants.	:	Filed: February 23, 1989

Appeal from the United States District Court for the District of Connecticut.

This cause came on to be heard on the transcript of record from the United States District Court for the District of Connecticut and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the judgment of said District Court be and it hereby is reversed and the action be and it hereby is remanded to the district court for further proceedings consistent with the opinion of this court with costs to be taxed against the appellee.

Elaine B. Goldsmith,
Clerk

/s/

by: Edward J. Guardaro,
Deputy Clerk

ISSUED AS MANDATE

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

AETNA LIFE INSURANCE CO.	:	
vs.	:	CIVIL H-84-983 AHN
HENRY PARKER, as Treasurer of the State of Connecticut, and STATE OF CONNECTICUT	:	Filed: September 2, 1988

JUDGMENT

This action having come on for consideration of cross-motions for summary judgment before the Honorable Joan Glazer Margolis, United States Magistrate, and the Honorable Alan H. Nevas, United States District Judge, and

The Court having considered the full record of the case including applicable principles of law, and the Court having filed its Recommended Ruling on Cross-Motions for Summary Judgment, granting the plaintiff's motion and denying the defendants' motion,

It is accordingly ORDERED, ADJUDGED and DECREED that:

1. Judgment be and is hereby entered in favor of the plaintiff, declaring that the Employee Retirement Income Security Act ("ERISA"), 29 USC § 1001, *et seq.*, preempts the application of the Connecticut escheat statute, Connecticut General Statutes section 3-64a, to the proceeds of any uncashed ERISA claims benefits checks/drafts issued by the plaintiff;

2. Judgment be and is hereby entered in favor of the plaintiff and against the defendants, denying defendants' counterclaim for delivery of abandoned property; and

3. Judgment be and is hereby entered denying plaintiff's claim for injunctive relief without prejudice.

Dated at Hartford, Connecticut this 2nd day of September, 1988.

KEVIN F. ROWE, Clerk

By /s/
Dennis P. Iavarone
Deputy in Charge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

AETNA LIFE INSURANCE COMPANY	:	
Plaintiff	:	Civil Action No. H-84-983 (AHN)
vs.	:	
HENRY PARKER, TREASURER OF THE STATE OF CONNECTICUT, ET AL.	:	DECEMBER 15, 1987
Defendant	:	

STIPULATION OF FACTS

1. The plaintiff (hereinafter referred to as "Aetna") is a Connecticut corporation engaged in the insurance business and is domiciled in the state of Connecticut with its principal office of business in Hartford.

2. The defendants are the Treasurer of the State of Connecticut (hereinafter referred to as the "Treasurer") and the State of Connecticut (hereinafter referred to as the "State").

3. Aetna provides health and accident insurance coverage to various employee welfare benefit plans subject to the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1001, *et seq.* (hereinafter referred to as "ERISA Plans").

4. Aetna also provides health and accident insurance coverage to various plans not subject to ERISA (hereinafter referred to as "non-ERISA Plans").

5. Aetna provides the insurance coverage to ERISA and non-ERISA Plans through group insurance policies.

6. When a claim insured under an ERISA Plan is filed, the claim is processed by Aetna and a draft drawn on an Aetna account is issued to pay the claim.

7. Some drafts which were issued prior to January 1, 1985, have not been presented for payment and remain on Aetna's records as outstanding drafts.

8. Aetna utilizes an "experience rating system" to establish the premium or calculate a credit against premium charges for every group insurance policy Aetna provides to the ERISA Plans. (Interrogatories 6/8/87, #10(a)). Approximately ninety percent of the ERISA Plan premiums are calculated retrospectively at the end of the policy year by charging the policyholder for the claims actually paid plus a handling charge (more fully described in Par. 12 below) of approximately ten percent. For the remaining plan premiums, the premium for the forthcoming year is determined prospectively based on the same factors. Thus, the experience rating system is based upon claims Aetna actually pays on behalf of ERISA Plans for their respective beneficiaries. The experience rating system is applied on a contract-by-contract basis or on a class-by-class basis.

9. Aetna is under no legal obligation to experience rate its policies. Aetna's board of directors approves the use of experience rating at the beginning of the experience period (policy year). The policies it sells

permit it to experience rate the cost of the insurance. (Maltz deposition, 3/26/85, pp. 118-119.)

10. Aetna calculates a reserve for incurred but unrecorded claims for each policy year (experience period). A claim is considered "incurred but unrecorded" if the covered services were provided during the policy year but payment by Aetna for those services has not cleared banking channels during the policy year. For the initial policy year, the reserve amount is based on class history and for the succeeding years it is estimated based on either the class or plan history of claim drafts which cleared banking channels after the end of the policy year for services rendered prior to the end of the policy year. (Interrog., 8/20/87, #1(a); Deposition of Allen P. Maltz, 3/26/85, p. 68.)

11. Unrecoverable losses are a contingency which is figured into the experience rating formula. A portion of the premium Aetna charges to ERISA and non-ERISA Plans is a charge for that contingency or "risk." (Maltz deposition, 3/26/85, p. 108-09).

12. The experience rating formula used by Aetna to establish a premium is calculated by adding drafts which cleared banking channels (paid drafts) plus contingency and administrative charges plus an amount for current reserves for incurred but unrecorded claims less an amount for prior required reserves. (Interrog., 8/20/87, #5(a)). Thus, the worse a plan's loss experience is, as evidenced by total paid drafts, the higher the insurance cost (the premium) will be for the insured plan.

13. Aetna's experience rating system credits to each ERISA plan policyholder premium and interest credits, if any, and charges the policyholder with paid claims plus any reserve changes, claim expenses, other administrative expenses, contingency charges and

profit charges to determine an experience balance. In general, Aetna refunds or credits experience surpluses to the policyholder and carries deficits forward to be recovered from future premiums.

14. As to cancelled or terminated ERISA Plans, two years after the date of cancellation or termination, the reserves established to cover incurred but unrecorded claims are returned to the Plan (or credited to it) less a residual reserve of approximately 2 percent. (Interrog., 6/8/87, #8(a).)

15. Aetna has elected to use the "presented basis" accounting system for its ERISA and non-ERISA Plans in implementing its experience rating formula. (Interrog., 6/8/87, #'s 4, 12) (Maltz deposition, 7/25/85, p. 179).

16. Aetna's insurance contracts with ERISA Plans do not specifically provide that Aetna will use the "presented basis" of charging claims for accounting purposes. Use of the "presented basis" is a "practice." (Interrog., 6/8/87, #12).

17. "Presented basis" accounting means that a policyholder's loss experience is not charged for a claim until the draft clears banking channels.

18. "Presented basis" accounting is in contrast to "issued basis" accounting in which a policyholder's loss experience is charged for a claim at the time the insurer issues a draft to the payee.

19. Most insurers use the "issued basis" accounting system for the ERISA and non-ERISA Plans they insure. (Maltz deposition, 3/26/85, pp. 73, 152).

20. Use of the presented basis of accounting may give Aetna a competitive marketing and sales

advantage over its competitors, most of whom use the issued basis of accounting. (Interrog., 6/8/87 #5 and 3/27/85, #12; Maltz deposition, 3/26/85, p. 119; Donahue deposition, 7/22/86, pp. 66-67).

21. Aetna has not charged the face amounts of the outstanding unpaid drafts mentioned in Par. 7 to the ERISA Plans under which those drafts were issued and has not included those specific amounts as paid claims in the calculation of the premiums charged to those Plans.

22. Aetna's contracts with policyholders state that Aetna may declare an experience credit in such amount as Aetna may determine. (Sample policies).

23. Aetna has negotiated with ERISA Plans as to the amount of experience rating credit it will pay the Plans. (Interrog., 3/27/87, #19; Maltz deposition, p. 121).

24. Aetna has adjusted the amount of an experience rating credit in order to prevent an ERISA Plan from terminating or cancelling its policy. (Interrog., 3/27/87, #19(c)).

25. For all outstanding claim drafts issued prior to January 1, 1982, which have not yet cleared banking channels, Aetna did not maintain a file or system that enables Aetna to identify the payees (by name and address) of the drafts, or the ERISA Plans to which such drafts would be charged. (Interrog., 3/27/87, 1(a), 3(a), 3(g), 7(a), 8(a), 9(b); Maltz deposition, 3/26/85, pp. 45-46, 112; Carling deposition, 7/21/86, Exh. 9).

26. Aetna made no attempts to contact payees for ERISA drafts issued prior to 1982 because of a business decision based on expenses of carrying out this procedure. For drafts issued in 1982, Aetna sent contact

letters to payees of outstanding drafts having a face amount of at least $250.00; for drafts issued in 1983 and thereafter, Aetna sent contact letters to payees of outstanding drafts of at least $100. This procedure applies to ERISA and non-ERISA Plans. (Interrog., 3/27/87, #10(a)-10(c), 10(h)).

27. Aetna does not advertise names of payees of outstanding drafts in newspapers. (Maltz deposition, 7/25/85, p. 220).

28. Aetna has no specific record or system designed to list terminated or cancelled ERISA Plans. (Interrog., 3/27/86, #3(a)).

29. Cancelled or terminated ERISA Plans are not charged for outstanding drafts presented for payment after final accounting, which occurs approximately two years after cancellation of the plan. (Interrog., 3/27/87, #3(e),(f); Maltz deposition, 7/25/85, p. 215).

30. For ERISA Plans cancelled or terminated more than three years prior to November 1, 1987, Aetna would be unable to reduce experience rating credits for such plans or to increase premium charges to them to reflect funds escheated to the State. (Interrog., 6/8/87, # 6, 7).

31. For any ERISA Plan cancelled or terminated more than two years ago, Aetna cannot adjust the experience rating credit given to the Plan. In addition, premiums are not charged to cancelled or terminated Plans. Therefore, if an outstanding draft is presented for payment more than two years after the Plan is cancelled or terminated, Aetna cannot charge such Plan's loss experience for the amount of the draft. (Maltz deposition, pp. 106, 113; Interrog., 3/27/87, #3(e) and #3(f)). In his deposition, Allen P. Maltz, an Aetna

employee employed as an actuary in the Employee Benefits Division, responded to the question "Would the payment of a check which has been outstanding more than two years after the cancellation of a plan affect or relate to that plan?" by stating: "To the individual plan? No." Aetna objects pursuant to Fed. R. Civ. P. 32(d)(3)(A) to any consideration of this statement by the Court on the grounds that the question requires a legal conclusion which Mr. Maltz is incompetent to provide and that Mr. Maltz' opinion as to the legal conclusion requested by the question is irrelevant and immaterial.

32. Prior to 1985 Aetna did not maintain its book of business by ERISA status of the plans it insures. (Response to plaintiff's interrogatories 3/27/87, #7(a)).

33. Aetna cannot accurately determine which outstanding drafts for the period 1/1/75 through 12/31/83 are attributable to ERISA Plans and which are attributable to non-ERISA Plans. (Production Document #200047, #200166). Aetna and the State have reviewed Aetna's records and based on that review, the parties agree that the amount of outstanding, valid drafts issued to or for ERISA Plan beneficiaries prior to January 1, 1985 exceeds two million five hundred thousand dollars ($2,500,000.00).

34. Aetna's policy is to honor valid drafts presented for payment, even if they were issued more than three years earlier provided Aetna's records indicate that the draft has not been previously paid or cancelled. (Interrog., 3/27/87, #3(d)).

35. Aetna will pay a conservator appointed pursuant to Conn. Gen. Stat. §§ 45-70a to 45-72, inclusive, of a payee of a draft issued pursuant to a validly incurred and insured ERISA claim if such conservator presents the draft for payment. (Response to plaintiff's interrogatories 6/8/87, #13).

36. In the deposition of Paul J. Donahue, an Aetna employee employed as an assistant actuary in the employee benefits division, the following examination transpired:

Q. . . .

Are you aware that most of the ERISA plans where they're insured the insurance companies account for the outstanding claims on an issued basis?

A. It is my understanding, and our marketing people, that many of our competitors are on an issued basis of accounting.

Q. In other words, they charge the plan at the time they issue the check or draft?

A. Yes.

Q. Would they be adversely affected if they were required to turn over the funds represented by outstanding ERISA drafts?

A. They, which they, the plans?

Q. The plans.

A. Not directly.

Q. Would the insurance companies be adversely affected?

A. They would be in the first place adversely affected.

Q. Why?

A. Because they would have to pay out monies which otherwise they would retain.

(Donahue deposition, 7/22/86, pp. 65-66).

Aetna objects pursuant to Fed. R. Civ. P. 32(d)(3)(A) to any consideration of this testimony by the Court.

37. On April 8, 1982, Aetna and the State entered into a settlement agreement covering escheatment of all of Aetna's obligations under the escheat statute for the period up to and including calendar year 1981 including amounts for outstanding drafts issued on account of ERISA Plans prior to the effective date of ERISA. Pursuant to the settlement agreement, Aetna paid $7,131,772.71 to the State. (Maltz deposition, 130). A copy of the 1982 settlement agreement is attached as Exhibit A.

38. Amounts paid to the State of Connecticut on account of health and welfare benefit plans pursuant to the 1982 settlement were charged to all ERISA and non-ERISA Plans, alike, as an item of expense. The amount charged to each Plan was not based upon a determination of which drafts were attributable to a specific Plan. (Maltz deposition, pp. 130-31; Donahue deposition, p. 69).

39. Subsequent to the 1982 settlement, Aetna has made the necessary system changes so that amounts determined to be escheatable will be charged

directly to the health and welfare benefit plan that gave rise to the amounts. (Maltz deposition, p. 166).

40. Aetna has reported and delivered all outstanding drafts issued more than five years ago pursuant to life insurance policies regardless of ERISA status. (Interrog., 3/27/87, #4(a)). Aetna experience rates the premiums for life insurance policies sold to ERISA Plans.

41. Aetna-insured ERISA Plans are charged for pharmacy and repetitive payment claims for experience rating purposes at the time the draft is issued by Aetna. These claims are treated as being on an issued basis accounting system. In the deposition of Aetna witness Allen P. Maltz, the following testimony was made:

> Q. "Is the plan charged for them [checks or drafts that are issued to pay pharmacy and repetitive payment claims] at the time the item is issued?
>
> A. Yes.
>
> Q. And, if you were to turn these over to the State of Connecticut, will you please tell me how the reporting of outstanding pharmacy and repetitive claims would relate to or affect the plan?
>
> A. Those plans would not be affected.

(Maltz deposition, 7/25/85, pp. 248-49; Interrog. 3/27/87, #5a).

Aetna objects pursuant to Fed. R. Civ. P. 32(d)(3)(A) to any consideration of this testimony by the Court.

42. If Aetna is required to pay or deliver the amount of outstanding ERISA Plan drafts to the State pursuant to Conn. Gen. Stat. § 3-64a, Aetna will be relieved of liability to the extent of the value of the outstanding drafts so paid or delivered, pursuant to Conn. Gen. Stat. § 3-67a(d).

43. In order to obtain payment of a draft the proceeds of which have been turned over to the State, a payee would have to obtain from and return to the State Treasurer a claim form. The Treasurer is required to consider each claim within ninety days after it is filed and may hold a hearing on a claim or refer a claim to the claims commissioner for hearings.

THE PLAINTIFF

By /s/
Allan B. Taylor
Day, Berry and Howard
CityPlace
Hartford, CT 06103
Tel. 275-0100
Its Attorney

THE DEFENDANTS

JOSEPH I. LIEBERMAN
ATTORNEY GENERAL

By /s/
William J. Prensky
Assistant Attorney General
30 Trinity Street
Hartford, CT 06106
Their Attorneys

AGREEMENT

THIS AGREEMENT is entered into between the State of Connecticut ("State"), acting herein by the Treasurer, being duly authorized, and Aetna Life and Casualty Company and subsidiary companies ("Aetna"), acting herein by its duly authorized officer on this 8th day of April, 1982.

WHEREAS, the Treasurer of the State of Connecticut in compliance with the duties of his office has commenced an examination to determine whether or not the holders of abandoned property have complied with the provisions of section 3-56a et seq. of the Connecticut General Statutes ("the Unclaimed Property Law") in reporting and delivering to the State monies and property presumed abandoned and, therefore, subject to claim by the State;

WHEREAS, Aetna has fully cooperated with the State by making its books and records available for inspection and its personnel available to assist in any manner requested by it;

WHEREAS, the Connecticut legislature in December 1981 amended the Unclaimed Property Law and thereby reduced the time period during which Aetna was required to hold these obligations and made payable in 1982 funds which ordinarily would have been payable during the years 1982 through 1985; and

WHEREAS, disputes have arisen between the parties hereto with regard to Aetna's obligation to report and deliver certain property to the Treasurer pursuant to the Unclaimed Property Law and with regard to the method of calculating the amount of such property.

WHEREAS, in view of the complex issues raised and the probability that long-term litigation would be required to resolve the disputes between the parties, Aetna and the State desire to resolve uncertainties in the interpretation of the Unclaimed Property Law and to resolve all claims which the State has asserted.

NOW THEREFORE, in consideration of the mutual promises hereinafter set forth, the parties agree as follows:

1. Aetna agrees to pay the State upon the execution hereof, the sum of seven million, one hundred thirty one thousand, seven hundred seventy two dollars and seventy one cents. ($7,131,772.71)

2. The State releases Aetna from all claims, demands, actions, or causes of action the State may have under the provisions of the Unclaimed Property Law by reason of any matter, cause or thing whatsoever which occurred prior to the date hereof except for causes of action the State may have on account of any amounts paid subsequent to January 1, 1975 pursuant to group accident and health benefit plans which are subject to the Employee Retirement Income Security Act of 1974, 29 U.S.C. 1001 et seq. ("ERISA").

3. The State releases Aetna from all the reporting requirements of Conn. Gen. Stat. Sec. 3-65a of the Unclaimed Property Law for calendar years 1961 through 1981 and for the drafts referred to in ¶ 7 *infra*.

4. The State reserves its right to claim payment, pursuant to the Unclaimed Property Law, of items which have been or will be transferred to the liability account described in ¶ 7(3) herein at any time before Aetna pays over and delivers the proceeds from said items to the state of issue, provided however that interest on any such claim is hereby waived by the

Treasurer. If, following payment to the State of such a claim, Aetna is required to make payment of the claim to another state or the original payee, the payment shall constitute a Second Payment within the meaning of ¶ 5 herein and the amount of the State's obligation to reimburse Aetna as provided in ¶ 5(f) shall be increased by such payments.

5. If Aetna is required to make payment of any claim arising from the ordinary course of its insurance business for which a draft was issued prior to the date hereof or to make payment of any claims, monies or properties paid to the State pursuant to this agreement, (hereinafter collectively referred to as "Second Payment") the State shall reimburse Aetna for the amount of such payment, including payments made for property reported in the aggregate as defined in Conn. Gen. Stat. Sec. 3- 65a, under the conditions recited below.

(a) Aetna shall assume responsibility for processing and payment of all claims to property delivered to the State pursuant to this agreement.

(b) If Aetna receives from any person, entity or other jurisdiction a request for a Second Payment, and if Aetna notifies the Treasurer that it intends to make the requested payment in the ordinary course of its business, the Treasurer shall have the right to elect, by written notice delivered to Aetna within thirty days after Aetna's notification to the Treasurer, to assume responsibility for and defend against such request at the Treasurer's expense. If the Treasurer so elects to assume such responsibility, Aetna shall cooperate with the Treasurer regarding the Treasurer's response. If the Treasurer does not so elect to assume such responsibility, Aetna shall have the right to make such payment, in which event:

(i) If such payment is made to another jurisdiction, Aetna shall be deemed to have been "compelled by authority of another jurisdiction" to have made such payment; and

(ii) If such payment is made to a person claiming to be the owner of the unclaimed property, proof shall be deemed to have been provided that the payee was entitled to such payment.

(c) If Aetna is not reimbursed, within thirty days of the Treasurer's receipt of notice of payment for the amount of said Second Payments, Aetna shall have the option without limitation of other remedies which may be available to it, of offsetting future unclaimed property payments to the State by the amount of such unreimbursed Second Payments.

(d) For the purposes of this paragraph, Second Payments shall not include any amounts paid subsequent to January 1, 1975 pursuant to group accident and health benefit plans which are subject to ERISA or payments made at any time for claims of non-insured parties which, if proven, would be subject to the Aetna's contractual obligation to indemnify its insured under a liability insurance policy.

(e) No state other than Alabama has asserted a claim against Aetna for failure to report unclaimed property.[1] The Alabama claim is in litigation. Aetna agrees not to settle the Alabama litigation; to pay the amount of any final judgment; and to bear its cost of defense. The State agrees to reimburse Aetna, within thirty days of notice of payment, for the

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[1] In 1980, the state of New York enacted an unclaimed property law and has sought comments from Aetna and other insurance companies regarding reporting requirements, but to date has asserted no claim against Aetna.

principal amount of the judgment in the Alabama litigation which is not related to claims of non- insured parties which are subject to Aetna's contractual obligation to indemnify its insureds under a liability insurance contract, but said reimbursement shall not exceed $25,000.

(f) The State's obligation to reimburse Aetna under this Agreement shall not exceed $7,131,772.71 plus amounts paid to the State pursuant to paragraph 8 *infra*.

6. Aetna shall have no obligation to report or make payment, pursuant to the Unclaimed Property Law, of claims asserted under group employee accident and health benefit plans subject to ERISA for which drafts are issued, but not presented for payment, and the State waives any interest which might be payable under provisions of this law unless and until an amendment to ERISA so requires such reporting, a final judgment of a Federal District Court within the Second Judicial Circuit, or a definitive ruling by the Department of Labor determines that ERISA does not preempt unclaimed property laws similar to the Connecticut Unclaimed Property Law with respect to such items. Nothing herein shall be deemed to be an admission by the State that ERISA preempts the Unclaimed Property Law.

7. The State has entered into this agreement in reliance upon the following representations of Aetna, and in the event Aetna has made any material misrepresentation as to these facts, the entire agreement is null and void.

(a) Aetna has caused its books and records to be examined to ascertain whether it now holds, at any time held, or at any time wrote off to profit property of the nature described in Exhibit 1, which is

not being held for payment to any other jurisdiction under an unclaimed property or escheat law.

(b) Based on the results of its examination of its Casualty & Surety Division claims the Aetna represents:

(i) For the years 1961 through 1974 it paid $7,170,387,301 for such claims.

(ii) For the years 1975 through 1978 it paid $4,988,049,065 for such claims.

(iii) In 1971, it paid $734,334,456 for such claims.

(iv) In 1971, according to its records, drafts totaling $744,037, issued as offers of settlement of such claims, were not presented for payment.

(v) Aetna has no copies of these unpresented drafts nor does it have any records from which it can identify the name and address of the payee.

(vi) Aetna has no record of the claim for which these drafts were issued nor records from which it can determine if these claims have been satisfied.

(vii) Aetna believes that the status of its records and the relation of the amount of its unpresented drafts to the amount of claims paid for 1971 is representative for the years 1961 through 1978.

(c) Based on the results of its examinations of group accident and health claims Aetna represents:

(i) For the years 1961 through 1978, it paid the amount of group accident and health insurance benefits specified in column (2) of Exhibit 2 attached hereto.

(ii) A statistical analysis, which Aetna believes is a fair representation, shows that nineteen percent of these policies are not subject to ERISA.

(iii) A statistical analysis, which Aetna believes is a fair representation, of the amount of unpresented drafts issued as offers of payment of these claims, shows that the amount of unpresented drafts as a percentage of paid benefits is as stated in column (4) of Exhibit 2.

(iv) For drafts issued prior to January 1, 1977 Aetna has no record of the claim for which the draft was issued nor records from which it can determine if the claim has been satisfied. For drafts issued subsequent to January 1, 1977, Aetna's records in this regard are incomplete.

(d) A statistical analysis, which Aetna believes to be a fair analysis, of its existing records of cash, stock dividends and interest payments made to Aetna, but which were not due to it and for which the name and address of the rightful owner is unascertainable, for the years 1961 through 1978, shows the amount of such property is $476,867.

(e) A liability account containing miscellaneous items with no data base originally scheduled for escheat during the years after 1981 contains more than 25,000 items having an aggregate value of $338,385.21. The account also contains unpresented checks and other instruments with a data base but no address, no state code, and frequently no name. The same liability account contains more than

32,500 additional items having an aggregate value of $716,493.12 for instruments issued prior to January 1, 1975 and $894,372.56 for instruments issued from January 1, 1975 to December 31, 1978 for which Aetna has no record of the address, no record of the state in which the check was issued, and frequently no record of the name of the payee and no record showing the funds can be rightfully claimed by Aetna. [2]

8. Aetna agrees to pay to the State in accordance with the procedures set forth in the Unclaimed Property Law the amount of all unpresented drafts issued through the date hereof by the Commercial Insurance Division and the Automobile and Homeowner Operations of the Personal Financial Security Division (formerly the Casualty & Surety Division) in satisfaction of any contractual obligations except contractual obligations to indemnify its insureds under a liability insurance policy. The amount will be determined by multiplying the annual claims paid by the Commercial Insurance Division and the Automobile and Homeowners Operations of the Personal Financial Security Division by the factor of .000418899.

IN WITNESS WHEREOF, the parties have hereunto set their hands and seals this 7th and 8th days of April, 1982.

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[2] For items in this accounts for which Aetna has a record of the state in which the check was issued, Aetna has paid over and delivered the proceeds of any unpresented checks to the state of issue in accordance with Aetna's interpretation of that state's unclaimed property law, but if the issuing state did not have an unclaimed property law, the proceeds are being delivered to Connecticut herewith in accordance with its Unclaimed Property Law. Nothing contained in this Agreement shall be deemed to waive or otherwise affect the rights of the State to make a claim against another state which received the proceeds described above.

Signed, Sealed and
Delivered
In the Presence of:

/s/

/s/

TREASURER, STATE
OF CONNECTICUT

/s/
HENRY E. PARKER
Duly authorized in
accordance with the
provisions of Sec. 3-7
of the Connecticut
General Statutes

STATE OF CONNECTICUT)
) ss. Hartford April 7, 1982
COUNTY OF HARTFORD)

Personally appeared, Henry E. Parker, Treasurer of the State Connecticut, Signer and Sealer of the foregoing instrument, who acknowledged the same to be his free act and deed, duly authorized by Sec. 3-7 of the Connecticut General Statutes, before me.

/s/
Commissioner of Superior Court

Signed, Sealed and
Delivered
In the Presence of:

/s/

/s/

AETNA LIFE AND
CASUALTY COMPANY

/s/
Duly authorized to act on
behalf of Aetna Life and
Casualty Company

STATE OF CONNECTICUT)
) ss. Hartford
COUNTY OF HARTFORD)

Personally appeared, Robert G. Maxon, Signer and Sealer, on its behalf of the foregoing instrument, who acknowledged the same to be his free act and deed, before me.

/s/

Exhibit 1

1. Property which Connecticut contends may be presumed to be abandoned pursuant to § 3-64a including but not limited to:

   (a) Unclaimed policy dividends;

   (b Unclaimed lapsed policies with cash values;

   (c) Unclaimed premium refunds;

   (d) Unclaimed employee accident, health and life insurance benefit plan payments;

   (e) Unclaimed cash and stock dividends on shares of stock, and unclaimed interest payments on debt obligations, that were received but which were not due to it and which has not paid over to the issuer, the lawful owner or other person entitled thereto;

   (f) Unclaimed agent commissions and credit balances;

   (g) Unidentified remittances;

   (h) Uncashed trade, vendor and payroll checks;

   (i) Unpresented drafts and uncashed checks;

(j) Uncashed stock dividend checks and "underlying" shares (if applicable).[3]

2. Property which Connecticut contends may be presumed to be abandoned pursuant to § 3-58a including but not limited to:

(a) Unclaimed policy proceeds;

(b) Unclaimed death claims;

(c) Unclaimed annuity payments;

(d) Unclaimed endowment payments;

(e) Unclaimed proceeds of matured, terminated or limited age policies.

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[3] Records of uncashed stock dividend checks issued since 1971 will not be available for several months. The amount of said checks issued prior to January 1, 1975 will be escheated when the records are available.

Exhibit 2

ESTIMATED OUTSTANDING AMOUNTS FOR GROUP A&H

Year (1)	Countrywide Paid Group A&H Insurance Benefits (2)	Percent Not Subject to ERISA (3)	% Outstanding (4)
1961	$ 386,906,091	100%	.008236%
1962	433,027,930	100	.008236
1963	446,259,677	100	.008236
1964	501,663,384	100	.008236
1965	577,409,753	100	.008236
1966	626,210,234	100	.008236
1967	707,806,527	100	.008236
1968	831,823,211	19	.008236
1969	960,238,012	19	.008236
1970	1,113,192,859	19	.008236
1971	1,118,128,522	19	.008236
1972	1,064,941,189	19	.008236
1973	1,067,139,194	19	.008236
1974	1,199,089,021	19	.010116
1975	1,453,754,854	19	.012425
1976	1,543,380,121	19	.015260
1977	1,665,794,536	19	.048812
1978	1,745,754,876	19	.037253

ERISA § 3(1) - (3), 29 U.S.C. § 1002(1) - (3) (1982)

§ 1002. Definitions

For purposes of this subchapter:

(1) The terms "employee welfare benefit plan" and "welfare plan" mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services, or (B) any benefit described in section 186(c) of this title (other than pensions on retirement or death, and insurance to provide such pensions).

(2)(A) Except as provided in subparagraph (B), the terms "employee pension benefit plan" and "pension plan" mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that by its express terms or as a result of surrounding circumstances such plan, fund, or program--

(i) provides retirement income to employees, or

(ii) results in a deferral of income by employees for periods extending to the termination of covered employment or beyond,

regardless of the method of calculating the contributions made to the plan, the method of calculating the benefits under the plan or the method of distributing benefits from the plan.

(B) The Secretary may by regulation prescribe rules consistent with the standards and purposes of this chapter providing one or more exempt categories under which--

(i) severance pay arrangements, and

(ii) supplemental retirement income payments, under which the pension benefits of retirees or their beneficiaries are supplemented to take into account some portion or all of the increases in the cost of living (as determined by the Secretary of Labor) since retirement,

shall, for purposes of this subchapter, be treated as welfare plans rather than pension plans. In the case of any arrangement or payment a principal effect of which is the evasion of the standards or purposes of this chapter applicable to pension plans, such arrangement or payment shall be treated as a pension plan.

(3) The term "employee benefit plan" or "plan" means an employee welfare benefit plan or an employee pension benefit plan or a plan which is both an employee welfare benefit plan and an employee pension benefit plan.

ERISA § 502(a), (e), 29 U.S.C. § 1132(a), (e) (1982)

§ 1132. Civil enforcement

(a) Persons empowered to bring a civil action

A civil action may be brought--

(1) by a participant or beneficiary--

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title;

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;

(4) by the Secretary, or by a participant, or beneficiary for appropriate relief in the case of a violation of 1025(c) of this title;

(5) except as otherwise provided in subsection (b) of this section, by the Secretary (A) to enjoin any act or practice which violates any provision of this subchapter, or (B) to obtain appropriate equitable relief

(i) to redress such violation or (ii) to enforce any provision of this subchapter; or

(6) by the Secretary to collect any civil penalty under subsection (i) of this section.

. . . .

(e) Jurisdiction

(1) Except for actions under subsection (a)(1)(B) of this section, the district courts of the United States shall have exclusive jurisdiction of civil actions under this subchapter brought by the Secretary or by a participant, beneficiary, or fiduciary. State courts of competent jurisdiction and district courts of the United States shall have concurrent jurisdiction of actions under subsection (a)(1)(B) of this section.

(2) Where an action under this subchapter is brought in a district court of the United States, it may be brought in the district where the plan is administered, where the breach took place, or where a defendant resides or may be found, and process may be served in any other district where a defendant resides or may be found.

ERISA § 514(a), 29 U.S.C. § 1144(a) (1982)

§ 1144. Other laws.

(a) Supersedure; effective date

Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title. This section shall take effect on January 1, 1975.

29 C.F.R. § 2560.503-1 (1988)

§ 2560.503-1 Claims procedure.

(a) Scope and purpose. (1) This section sets out certain minimum requirements for employee benefit plan procedures pertaining to claims by participants and beneficiaries (claimants) for plan benefits, consideration of such claims, and review of claim denials, hereinafter referred to in the aggregate as "claims procedures." Except as otherwise noted, these requirements apply to every employee benefit plan described in section 4(a) and not exempted under section 4(b) of the Employee Retirement Income Security Act of 1974 (the Act).

. . . .

(c) Claims procedure for an insured welfare or pension plan. (1) To the extent that benefits under an employee benefit plan are provided or administered by an insurance company, insurance service, or other similar organization which is subject to regulation under the insurance laws of one or more States, the claims procedure pertaining to such benefits may provide for filing of a claim for benefits with and notice of decision by such company, service or organization.

(2) See paragraph (g) regarding review and final decision on denied claims by insurance companies, insurance services and similar organizations.

(d) Filing of a claim for benefits. For purposes of this section, a claim is a request for a plan benefit by a participant or beneficiary. A claim is filed when the requirements of a reasonable claim filing procedure of a plan have been met. If a reasonable procedure for filing claims has not been established by the plan, a claim shall be deemed filed when a written or oral

or oral communication is made by the claimant or the claimant's authorized representative which is reasonably calculated to bring the claim to the attention of:

. . . .

(3) In the case of a plan the benefits of which are provided or administered by an insurance company, insurance service, or other similar organization, which is subject to regulation under the insurance laws of one or more States, the person or organizational unit which handles claims for benefits under the plan or any officer of the insurance company, insurance service, or similar organization.

. . . .

(f) Content of notice. A plan administrator or, if paragraph (c) of this section is applicable, the insurance company, insurance service, or other similar organization, shall provide to every claimant who is denied a claim for benefits written notice setting forth in a manner calculated to be understood by the claimant:

(1) The specific reason or reasons for the denial;

(2) Specific reference to pertinent plan provisions on which the denial is based;

(3) A description of any additional material or information necessary for the claimant to perfect the claim and an explanation of why such material or information is necessary; and

(4) Appropriate information as to the steps to be taken if the participant or beneficiary wishes to submit his or her claim for review.

(g) Review procedure. (1) Every plan shall establish and maintain a procedure by which a claimant or his duly authorized representative has a reasonable opportunity to appeal a denied claim to an appropriate named fiduciary or to a person designated by such fiduciary, and under which a full and fair review of the claim and its denial may be obtained. Every such procedure shall include but not be limited to provisions that a claimant or his duly authorized representative may:

(i) Request a review upon written application to the plan;

(ii) Review pertinent documents; and

(iii) Submit issues and comments in writing.

(2) To the extent that benefits under an employee benefit plan are provided or administered by an insurance company, insurance service, or other similar organization which is subject to regulation under the insurance laws of one or more States, the claims procedure pertaining to such benefits may provide for review of and decision upon denied claims by such company, service or organization. In such case, that company, service, or organization shall be the "appropriate named fiduciary" for purposes of this section. In all other cases, the "appropriate named fiduciary" for purposes of this section may be the plan administrator or any other person designated by the plan, provided that such plan administrator or other person is either named in the plan instrument or is identified pursuant to a procedure set forth in the plan as the person who reviews and makes decisions on claim denials.

CONN. GEN. STAT § 3-64a (1989)

Sec. 3-64a. Property presumed abandoned generally. All property not otherwise provided for or excluded from this part, including any income, interest or other increment thereto and deducting any lawful charges, which is held or owing in this state and has remained unclaimed by the owner for more than three years after it became due, payable or distributable, is presumed abandoned.

CONN. GEN. STAT § 3-65a (1989)

Sec. 3-65a. Duties of holder of abandoned property. (a) Within one year before a presumption of abandonment is to take effect in respect to any property and if the owner's claim is not barred by law, the holder shall notify the owner thereof, by first class mail directed to the owner's last known address, that evidence of interest must be indicated as required by this part or such property will be transferred to the treasurer and will be subject to escheat to the state.

(b) Within ninety days after the close of the calendar year in which property is presumed abandoned, the holder shall pay or deliver such property to the treasurer and file, on forms which the treasurer shall provide, a report of unclaimed property. Each report shall be verified and shall include: (1) The name, if known, and last-known address, if any, of each person appearing to be the owner of such property; (2) in case of unclaimed funds of life insurance corporations, the full name of the insured or annuitant and beneficiary and his last known address appearing on the life insurance corporation's records; (3) the nature and identifying number, if any, or description of the property and the amount appearing from the records to be due except that the holder shall report in the aggregate items having a value of twenty-five dollars or less; (4) the date when the property became payable, demandable or returnable and the date of the last transaction with the owner with respect to the property; (5) if the holder is a successor to other holders, or if he has changed his name, all prior known names and addresses of each holder of the property, and (6) such other information as the treasurer may require.

(c) Verification, if made by a partnership, shall be executed by a partner; if made by an unincorporated association or private corporation, by an

officer; and if made by a public corporation, by its chief fiscal officer.

(d) The treasurer shall keep a permanent record of all reports submitted to him.

(e) No owner shall be entitled to any interest, income or other increment which may accrue to property presumed abandoned from and after the date of payment or delivery to the treasurer.

(f) The treasurer may decline to receive any property the value of which is less than the cost of giving notice or holding sale, or he may postpone taking possession until a sufficient sum accumulates.

(g) The treasurer, or any officer or agency designated by him, may examine any person on oath or affirmation, or the records of any person, who he has reason to believe has knowledge of or has failed to report or transmit property presumed abandoned. The treasurer may bring an action in a court of appropriate jurisdiction to enforce the provisions of this part.

(h) Upon request of the holder, the treasurer may approve the aggregate reporting on an estimated basis of two hundred or more items in each of one or more categories of unclaimed funds whenever it appears to him that each of the items in any such category has a value of more than ten dollars but less than twenty-five dollars and the cost of reporting such items would be disproportionate to the amounts involved. Any holder electing to so report any such category in the aggregate shall assume responsibility for any valid claim presented within twenty years after the year in which the items in such category are presumed abandoned.

CONN. GEN. STAT § 3-66a (1989)

Sec. 3-66a. Notice by treasurer. (a) On July first each year, or as soon thereafter as practicable, the treasurer shall cause notice to be published of all property having a value of twenty-five dollars or more reported and transferred to him which was presumed abandoned during the preceding calendar year. Such notice shall be published at least once in a newspaper having general circulation in each county in which is located the last-known address of each person appearing to be the owner of such property. If no address is listed, or if the address is not within this state, notice shall be published in a county in which the holder has his principal place of business.

(b) Such notice shall be entitled "Notice of Names of Persons Appearing to Own Abandoned Property" and it shall contain: (1) The names, in alphabetical order, and the last known addresses, if any, of all persons reported as the apparent owners of unclaimed property and (2) a statement that any person possessing an interest in such property may obtain from the treasurer information concerning the amount and description of such property and the name and address of the holder thereof.

(c) The treasurer may insert in any such notice such additional information as he deems necessary for the proper administration of this part.

(d) The provisions of this section shall not apply to items reported in the aggregate pursuant to subsection (h) of section 3-65a.

CONN. GEN. STAT § 3-66b (1989)

Sec. 3-66b. Unclaimed intangible property. Conditions raising presumption of abandonment. Intangible property is subject to the custody of the state as unclaimed property if the conditions raising a presumption of abandonment under section 3-57a, 3-58a, 3-59a, 3-59b, 3-61a or 3-64a are satisfied and:

(1) The last-known address of the apparent owner, as shown on the records of the holder, is in this state;

(2) The records of the holder do not include the name of the person entitled to the property and it is established that the last-known address of such person is in this state;

(3) The records of the holder do not reflect the last-known address of the apparent owner, and it is established that (A) the last-known address of the person entitled to the property is in this state, or (B) the holder is a domiciliary or a governmental subdivision or agency of this state and has not previously paid or delivered the property to the state of the last-known address of the apparent owner or other person entitled to the property;

(4) The last-known address of the apparent owner, as shown on the records of the holder, is in a state that does not provide by law for the escheat or custodial taking of the property or the escheat or unclaimed property law of which is not applicable to the property and the holder is a domiciliary or a governmental subdivision or agency of this state;

(5) The last-known address of the apparent owner, as shown on the records of the holder, is in a foreign nation and the holder is a domiciliary or a governmental subdivision or agency of this state; or

(6) The transaction out of which the property arose occurred in this state and (A) (i) the last-known address of the apparent owner or other person entitled to the property is unknown, or (ii) the last-known address of the apparent owner or other person entitled to the property is in a state that does not provide by law for the escheat or custodial taking of the property or the escheat or unclaimed property law of which is not applicable to the property, and (B) the holder is a domiciliary of a state that does not provide by law for the escheat or custodial taking of the property or the escheat or unclaimed property law of which is not applicable to the property.

CONN. GEN. STAT § 3-67a (1989)

Sec. 3-67a. State responsibility for property. Reimbursement of prior holder for payment to holder. Reimbursement of holder compelled to register transfer of original certificate. (a) Upon payment or delivery of property presumed abandoned to the treasurer, the state shall assume custody and, except as otherwise provided in subsection (h) of section 3-65a, shall be responsible for all claims thereto. If, after payment or delivery to the treasurer, any holder is compelled by authority of another jurisdiction to make a second payment, the treasurer, upon proof thereof, shall refund to the holder the amount of such second payment not in excess of the amount paid or realized under the provisions of this part.

(b) Any holder who, having transmitted unclaimed property to the treasurer, makes payment therefor within the time limited by subsection (a) of section 3-70a to any person appearing to be the owner shall be reimbursed by the treasurer upon proof of payment and upon proof that the payee was entitled thereto.

(c) Whenever any property other than money is paid or delivered to the treasurer under this part, the treasurer upon receipt shall credit to the owner's account any dividends, interest or other increments realized or accruing on the property at or before liquidation or conversion thereof into money.

(d) Any person who pays or delivers to the treasurer, in good faith, property presumed abandoned pursuant to section 3- 59b shall be relieved of liability, to the extent of the value of the property so paid or delivered, for any claim then existing or which thereafter may arise or be made in respect to the property. For the purposes of this section "good faith"

means that payment or delivery was made in a reasonable attempt to comply with this part, that the person making payment or delivery of the property had a reasonable basis for believing, based on the facts as they were known to him, that the property was abandoned for the purposes of this part; and there is no showing that the records pursuant to which the payment or delivery was made did not meet reasonable standards of practice in the industry.

(e) If such person pays or delivers property to the treasurer, in good faith, property presumed abandoned pursuant to section 3-59b and thereafter any other person claims the property from the person so paying or delivering or another state claims the property under its laws relating to escheat or abandoned or unclaimed property, the treasurer, upon written notice of the claim, shall defend the person who paid or delivered such property against the claim and indemnify him against any liability on the claim.

CONN. GEN. STAT § 3-69a (1989)

Sec. 3-69a. Disposition of funds by treasurer. All funds received under this part, including the proceeds from the sale of property, shall be deposited in the general fund; except that the treasurer shall retain in a separate fund twenty-five thousand dollars or an amount equal to seven percent of the gross receipts of the previous fiscal year, whichever amount is greater, which he may deposit in any bank or trust company in which state funds may be deposited, from which he shall pay all claims allowed as hereinafter provided. If at any time said fund is insufficient for such purpose, the governor, with the advice and consent of the finance advisory committee, may add thereto from the unappropriated resources of the general fund the amount estimated to be required to make up such deficiency.

CONN. GEN. STAT § 3-70a (1989)

Sec. 3-70a. Claims for abandoned property. (a) Any person claiming an interest in property surrendered to the treasurer under the provisions of this part may claim such property, or the proceeds from the sale thereof, at any time thereafter.

(b) The treasurer shall consider each claim within ninety days after it is filed. He may hold hearings on any claim and he may refer any claim to the claims commissioner, who shall hold hearings thereon and promptly return his recommendations for the payment or rejection thereof. The treasurer shall deliver his decision in writing on each claim heard, with a finding of fact and a statement of the reasons for his decision. No agreement to locate property entered into within two years after the date a report of unclaimed property is filed under section 3-65a shall be valid if, pursuant to such agreement, any person undertakes to locate property included in that report for a fee or other compensation exceeding twenty percent of the value of the recoverable property. Such an agreement shall be valid only if it is in writing, signed by the owner, and discloses the nature and value of the property, and the owner's share after the fee or compensation has been subtracted is clearly stipulated. Such fee or compensation shall not exceed fifty percent at any time. Nothing in this section shall be construed to prevent an owner from asserting, at any time, that any agreement to locate property is based upon excessive or unjust consideration.

(c) No claim to property presumed abandoned under sections 3-61a and 3-62a shall be allowed except upon written approval of the attorney general.

(d) The treasurer shall pay each claim allowed without deduction for costs of notices or sale or

for service charges. He shall notify the commissioner of revenue services of the payment of claims of five hundred dollars or more to the domiciliary administrator or executor of a deceased owner.

CONN. GEN. STAT § 3-71a (1989)

Sec. 3-71a. Appeals. Any person aggrieved by a decision of the state treasurer may appeal therefrom in accordance with the provisions of section 4-183, except venue for such appeal shall be in the judicial district of Hartford-New Britain*. If an appeal is taken without probable cause, the court may tax double or triple costs against the appellant, as the case demands.

CONN. GEN. STAT § 3-72a (1989)

Sec. 3-72a. Escheat proceedings. (a) Within ninety days after the close of the twentieth calendar year after the year in which any property is presumed abandoned, and no claim therefor having been made and established by any person entitled thereto, the treasurer shall apply to the superior court for the judicial district of Hartford-New Britain* for a determination that such property shall escheat to the state.

(b) Such action shall be deemed an action in rem and it shall be commenced in the manner provided by law and by the rules of the superior court for the commencement of civil actions. The complaint shall state the name and last-known address of each owner of property other than unclaimed funds reported in the aggregate pursuant to subsection (h) of section 3-65a, a description of the property, the name and address of the holder who transferred such property to the treasurer, the amount or value of the property and, if any funds were derived from the sale of property, the date and place of such sale.

(c) At the time such action is commenced, the treasurer shall cause notice thereof to be published once each week for two successive weeks in a newspaper having general circulation in each county in which is located the last-known address of each person listed as an owner in the complaint. Such notice shall be notice to all owners, their heirs, next-of-kin, assigns or other persons in interest to appear and present their claims to the treasurer within ninety days after the last day of publication thereof. Such notice shall be in form substantially as follows:

(Caption)

IN THE MATTER OF THE ESCHEAT
OF ABANDONED PROPERTY NOTICE
HELD BY THE TREASURER
OF THE STATE OF CONNECTICUT

TO THE FOLLOWING OWNERS, THEIR HEIRS, NEXT-OF-KIN, ASSIGNS OR OTHER PERSONS IN INTEREST OF THE FOLLOWING DESCRIBED PROPERTY:

Name and Address of Owner	Description of Property	Name of Prior Holder	Amount or Value

(Insert complete listing in alphabetical order)

TAKE NOTICE that a complaint has been filed in this cause by the State Treasurer whereby he seeks to escheat the above listed property to the State of Connecticut.

YOU AND EACH OF YOU is advised to present your claim to any of the above-listed property to which you may be entitled within ninety days after the last date of the publication of this notice, said date being _____, 19__.

FAILURE TO PRESENT YOUR CLAIM within the prescribed period will cause said property to escheat to the State of Connecticut as the absolute property of the state and all your right, title or interest thereto will be terminated.

Dated this _____ day of _____, 19_____

_____
State Treasurer
State of Connecticut
Room _____
State Capitol
Hartford, Connecticut

(d) Promptly upon the completion of such publication, the treasurer shall file a certificate thereof in the superior court.

(e) Any claim presented in response to such notice shall be considered as provided in section 3-71a.

CONN. GEN. STAT § 3-73b (1989)

Section 3-73b. Effect of expiration of limitation periods. The expiration of any period of time specified by the general statutes or any court order, during which an action or proceeding may be commenced or enforced to obtain payment of a claim for money or recovery of property, shall not prevent the money or property from being presumed abandoned property or affect any duty to file a report required by subsection (b) of Section 3-65a or to pay or deliver abandoned property to the state treasurer.

Supreme Court, U.S.
FILED
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CLERK

No. 88-1883

In The Supreme Court of the United States

OCTOBER TERM, 1988

AETNA LIFE INSURANCE CO.,
Petitioner,

v.

FRANCISCO L. BORGES, TREASURER OF THE STATE OF CONNECTICUT, and STATE OF CONNECTICUT,
Respondents.

On Petition For Writ of Certiorari to the United States Court of Appeals for the Second Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION

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QUESTION PRESENTED

Whether the Employee Retirement Income Security Act of 1974 ("ERISA") preempts Connecticut's unclaimed property statute, Conn. Gen. Stat. § 3-64a, as it applies to issued but uncollected checks and drafts for employee benefits provided through ERISA plans which are charged for such benefits in accordance with Aetna's presented basis accounting procedure?

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Conn. Subst. Senate Bill No. 1064, 1989 Gen. Assem. Sess. 8

STATEMENT OF THE CASE

In addition to the facts stated by the petitioner, the following facts, stipulated by the parties, are relevant to the disposition of the case. These facts pertain to Aetna's intricate accounting procedures used to calculate premiums charged to ERISA plans. The parties agreed that Aetna relies on its method of premium computation as a matter of its own choosing, rather than as a result of any legal obligation. Petitioner's Appendix (Pet. App.) at A44, ¶ 9; A46, ¶¶ 15, 16.[1]

Aetna's contention that under section 514(a) ERISA preempts Connecticut's unclaimed property law with regard to the checks and drafts it issues in payment of ERISA benefits requires an explanation of this accounting method. The District Court, relying on the parties' joint stipulation, found the following facts.[2] Using a method of group insurance pricing called "experience rating," Aetna

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[1] On this point the District Court specifically noted the following: By the terms of its contracts with policyholders, Aetna has discretion to set the amount of credits applied toward premiums; on occasion, Aetna has negotiated the amount of premiums and credits with ERISA plans; and it has made adjustments to premiums in order to prevent policyholders from terminating or cancelling their policies. Pet. App. at A19.

[2] The District Court decision is reported as *Aetna Life Insurance Co. v. Parker*, 692 F.Supp. 94 (D. Conn. 1988); however, for the convenience of the Court, reference to that decision is made through references to Petitioner's Appendix, pages A16 to A33, inclusive, wherein that decision is reprinted.

bases premiums for the ensuing year on several factors,[3] the most important of which is the amount actually paid in claims to members of that group during the pending year. Pet. App. at A18; A44, ¶ 8. Aetna does not include a claim from the previous year in its experience rating until the claim payment draft has cleared banking channels – a practice known as "presented basis accounting." Pet. App. at A18; A45, ¶ 12; A46, ¶ 17. Aetna uses the opposite method, "issued basis accounting," in which it charges drafts to the appropriate plan at the time it issues the drafts, only for pharmacy and repetitive payment claims. Pet. App. at A46, ¶ 18; A52, ¶ 41. Most insurers, in contrast to Aetna, use "issued basis accounting" for the ERISA and non-ERISA plans they insure. Pet. App. at A18-A19; A46, ¶ 19.

To cover the contingency in which Aetna's payment does not clear banking channels during the policy year, Aetna sets aside a reserve fund for payment of these claims based upon the group's claims history. Pet. App. at A19; A45, ¶ 10. The size of this reserve fund is also a factor in a plan's experience rating and will thus affect insurance premiums. Pet. App. at A45, ¶¶ 11, 12.

When an ERISA plan cancels or terminates an Aetna insurance policy, Aetna continues to pay claims submitted under the plan in the usual manner for two additional

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[3] Some of these factors, other than claims clearing banking channels, *see* text *infra*, are: a contingency for unrecoverable losses (Pet. App. at A45, ¶ 11); administrative charges; an amount for current reserves for incurred but unrecorded claims less an amount for prior required reserves; and profit charges. Pet. App. A45-46, ¶¶ 11, 12, 13.

years. Pet. App. at A19; A48, ¶ 29. Two years after the plan ends, Aetna returns the reserve funds to the plan, deducting a 2 percent residual for unclaimed drafts that the claimant may subsequently present. Pet. App. at A19; A46, ¶ 14. Once a final accounting has taken place, Aetna cannot charge a cancelled or terminated plan for drafts that a claimant subsequently presents for payment. Pet. App. at A48, ¶ 30.

REASONS FOR DENIAL OF THE PETITION

1. The question presented by the petitioner asks to what minimal extent does Connecticut's unclaimed property law have an impact on Aetna's accounting system. This is an esoteric issue of limited precedential value. The facts of this case turn on the unique and discretionary accounting method Aetna employs to charge premiums to the ERISA plans it insures. Petition (Pet.) at 3;[4] *See* the detailed accounting method outlined in the joint stipulation of facts, Pet. App. at A44-A46, ¶¶ 12-17; A48, ¶ 29. The parties stipulated that most insurers do not use the "presented basis" accounting method relied on by Aetna. Pet. App. at A46, ¶¶ 19, 20. The Court of Appeals relied on the following stipulated facts regarding the operation of Aetna's accounting methods:

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[4] The decision below is reported as *Aetna Life Insurance Co. v. Borges*, 869 F.2d 142 (2d Cir. 1989); however, for the convenience of the Court, references to that decision will be made to Petitioner's Appendix, pages A1 to A15, inclusive, wherein the decision is reprinted.

> The premium that Aetna charges to employers is based on each employer's "experience rating" – that is, it is related to the cost of providing benefits to the employees of that company in previous years. The more benefits paid out under a plan, the higher the premium will be for the employer.
>
> Not infrequently, after Aetna approves an employee's claim for benefits and issues a draft on an Aetna account to pay the claim, the employee fails to present the draft for payment. The draft then remains on Aetna's records as outstanding. . . .
>
> Aetna generally calculates the experience rating of employers on the basis of checks presented for payment ("presented basis" accounting) rather than on all checks that have been issued ("issued basis" accounting). . . .
>
> Most other insurers in Connecticut use issued basis accounting. To the extent that issued basis accounting may lead to higher premiums, Aetna enjoys a competitive marketing advantage over its competitors.

Pet. App. at A2 to A3.

Thus, any cost that ultimately may be passed on to ERISA plans through the operation of Connecticut's unclaimed property law is directly caused by Aetna's discretionary accounting procedures. Furthermore, the Court below was correct when it characterized the economic impact of Connecticut's law on the plans as "not substantial enough, however, to persuade us that this is the type of law Congress intended to preempt." Pet. App. at A12. "[I]ndirect economic impact alone is not sufficient." Pet. App. at A14.

2. The decision below does not conflict with any other federal or state court decision on the issue of ERISA preemption of state unclaimed property or escheat laws. On the contrary, there is consistency and unanimity on this issue. As Circuit Judge Newman noted, speaking for the Court, the Michigan Court of Appeals has ruled that the State of Michigan's escheat law was not preempted by ERISA. *Attorney General v. Blue Cross & Blue Shield*, 168 Mich. App. 372, 424 N.W.2d 54 (1988). Pet. App. at A4. There are no other reported decisions involving state unclaimed property or escheat laws and ERISA preemption.

Petitioner manufactures a conflict between the circuits when it claims *Blue Cross & Blue Shield of Florida, Inc. v. Department of Banking & Finance*, 791 F.2d 1501 (11th Cir. 1986) is inconsistent with the Second Circuit's decision in this litigation. In the Eleventh Circuit case, Florida's escheat law was held preempted, *not by ERISA*, but by a totally distinct federal statute, 5 U.S.C. § 8902(m)(l) (1982), dealing with a contractual provision in federal health benefits contracts.

Also, the Florida and Connecticut cases arise in different contexts. The Eleventh Circuit's scope of review was confined to the examination of an administrative record. The Eleventh Circuit was concerned whether a federal agency's determination of preemption was reasonable and not whether that position was actually correct in the first instance, as was the case in the Second Circuit's decision. In its ruling, however, the Eleventh Circuit specifically recognized, as did the Second Circuit here, the limiting parameters of ERISA preemption set forth by this Court in *Shaw v. Delta Airlines, Inc.*, 463 U.S.

85 (1983), to wit, that some state laws may affect employee benefit plans in too tenuous, remote or peripheral a manner to warrant a finding that the law "relates to" the ERISA plan. *Blue Cross & Blue Shield of Florida, Inc. v. Dept. of Banking and Finance*, 791 F.2d at 1505. *See also Aetna Life Insurance Co. v. Borges*, Pet. App. at A12 ("[W]e think that the impact of Connecticut's escheat law on ERISA benefit plans is too tenuous, remote, and peripheral to require preemption under Section 514(a)."). The Eleventh Circuit opined that as to its preemption finding, "the opposite conclusion might also be reasonable." *Blue Cross & Blue Shield of Florida, Inc. v. Dept. of Banking and Finance*, 791 F.2d at 1506.

3. The Court of Appeals reached a correct and fair decision. It aptly observed that ERISA does not address the situation involved in this case; that is, ERISA neither prescribes any particular procedure for handling ERISA benefits that are awarded but uncollected, nor does it specify a time limit for honoring such claims. Pet. App. at A4-A5. Noting this, the Court applied two decisions of this Court. It considered the general test for preemption of state laws which embody the traditional exercise of state power. Such laws are "not superceded by a federal act unless that was the clear and manifest purpose of Congress." *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 157 (1978). Pet. App. at A5. The Court also relied on the rule that some state laws can have a minimal or remote effect on ERISA plans yet not be superceded by ERISA. *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85, 100 n. 21 (1983), citing *American Telephone and Telegraph Co. v. Merry*, 592 F.2d 1181, 1121 (2d Cir. 1979). Pet. App. at A7. *See also Rebaldo v. Cuomo*, 749 F.2d 133, 138 (2d Cir. 1984), *cert. denied*, 472 U.S. 1008 (1985).

Within that framework, the Court of Appeals considered the three relevant areas in ERISA preemption analysis. First, it found that Connecticut's unclaimed property statute, Conn. Gen. Stat. § 3-64a, falls squarely within the class of laws recognized as historic police powers of the states. Escheat of abandoned property is such an area of traditional state authority. *Connecticut Mutual Life Insurance Co. v. Moore*, 333 U.S. 541, 547 (1948).[5] Pet. App. at A12.

Realizing that the traditional police power aspect of the state law is not sufficient by itself to survive preemption, the Court's second area of inquiry was the economic impact, if any, of the Connecticut statute on ERISA plans. Pet. App. at A10-A13. Although there is a limited economic impact here, it is caused solely by Aetna's voluntarily selected method of accounting which Aetna uses for pricing its insurance products. Thus, the economic impact of section 3-64a is solely indirect and, as the Court noted, not substantial enough to indicate that it is that type of law Congress intended ERISA to preempt.

Lastly, the Court considered the impact of the state law on the administrative functions of ERISA plans. Pet.

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[5] Federal courts have held that state laws involving other areas of traditional state control survive ERISA preemption; *e.g., Mackey v. Lanier Collections Agency & Service, Inc.*, 108 S.Ct. 2182 (1988) (state garnishment laws); *American Telephone and Telegraph Co. v. Merry*, 592 F.2d 1181 (2d Cir. 1979) (state domestic relations statute); *Rebaldo v. Cuomo*, 749 F.2d 133 (2d Cir. 1984), *cert. denied*, 472 U.S. 1008 (1985) (state hospital cost containment statute).

App. at A10-A11. Reviewing the facts of the case, the Court correctly found that the application of the Connecticut statute does not affect the calculation of ERISA benefits, the processing of payment or disbursing benefits, all areas that are precluded by state law. *Fort Halifax Packing Co., Inc. v. Coyne*, 482 U.S. 1, 9 (1987). Section 3-64a only comes into play *after* the ERISA plan has performed all of these vital administrative functions; the state statute clearly has no effect upon, and does not interfere with, the initial calculation and disbursement of ERISA benefits. Pet. App. at A11 n. 3.

Petitioner claims section 3-64a provides an alternative cause of action to recover ERISA benefits due under the terms of an ERISA plan in violation of section 502(a) of ERISA. Pet. App. at A15-A18. Acknowledging section 502(a) is the exclusive vehicle for ERISA plan beneficiaries and participants to recover benefits due under the terms of ERISA plans, *Pilot Life Insurance Co. v. Dedeaux*, 481 U.S. 41, 54 (1987), the court below correctly observed that section 3-64a "does not provide a civil action governing the issuance of drafts in the first instance," which is the intended gravamen of an action under section 502(a). Pet. App. at A15. Section 3-64a solely insures delivery of the ERISA draft many years after its issuance.[6]

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[6] The Connecticut General Assembly recently passed Subst. Senate Bill No. 1064. This bill, if approved by the Governor, would relieve the Treasurer of his obligation to escheat abandoned property which he has held in a custodial capacity for many years. *See* section 4. The actual escheatment of any funds held by the Treasurer would be purely discretionary, potentially providing access to such property in perpetuity.

Petitioner's argument under section 502(a) is therefore inapposite and erroneous.

The Court of Appeals was well aware that this Court's analysis of Georgia's generally applicable garnishment law under ERISA's preemption provision in *Mackey v. Lanier Collections Agency & Service, Inc.*, 108 S.Ct. 2182 (1988), was not upheld on the ground that the law's effect on ERISA plans was tangential. The Second Circuit merely cited *Mackey*, however, as "an example of a state statute with an indirect effect on ERISA plans that the Court did not find inconsistent with ERISA." *See* Pet. App. at A9 n. 2. This analysis is in total accord with this Court's prior decisions. *See Shaw v. Delta Airlines, Inc.*, 463 U.S. 85, 100 n. 21 (1983). *See also Rebaldo v. Cuomo*, 749 F.2d 133 (2d Cir. 1984), *cert. denied*, 472 U.S. 1008 (1985); *American Telephone and Telegraph Co. v. Merry*, 592 F.2d 118 (2d Cir. 1979).

Furthermore, the court correctly applied the criteria used by this court in *Mackey*. The Connecticut statute "does not single out or specially mention ERISA plans of any kind." *Mackey, supra*, at 2186. The Connecticut statute does not "expressly refer[] to – indeed, solely appl[y] to – ERISA employee benefit plans." *Mackey, supra*, at 2185. Section 3-64a does not focus specifically on ERISA plans or benefits; it applies to lost or abandoned property generally.

CONCLUSION

For the foregoing reasons, this Court should deny the petition for a writ of certiorari.

Respectfully submitted,

FRANCISCO L. BORGES, Treasurer
of the State of Connecticut,
and State of Connecticut

Respondents

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Petitioner,

v.

FRANCISCO L. BORGES, TREASURER OF THE STATE OF CONNECTICUT, and STATE OF CONNECTICUT,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

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REPLY BRIEF OF PETITIONER

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1988

AETNA LIFE INSURANCE CO., *Petitioner,*

v.

FRANCISCO L. BORGES, TREASURER
OF THE STATE OF CONNECTICUT,
and STATE OF CONNECTICUT, *Respondents.*

REPLY BRIEF OF PETITIONER

1. The State of Connecticut, like forty-seven other States, the District of Columbia, and the Virgin Islands, asserts the right to require ERISA plans to pay benefits to it when the ERISA beneficiary has left those benefits unclaimed for a specified period of time. Connecticut, like the other forty-nine jurisdictions, purports to relieve ERISA plans of their obligations for the unclaimed benefits and to require the beneficiaries to seek those benefits from a designated State official rather than from the plan and its insurer. And Connecticut, like each of the other States and territories, requires ERISA plans to maintain specified records, to comply with State-mandated notification procedures, and to file required reports on a periodic basis.

Nonetheless, Connecticut contends that the question presented by this petition is unique to Connecticut and Aetna. Yet even the State recognizes that Aetna's accounting system, which does not charge a loss to an ERISA plan's claim experience until after the draft issued to the claimant has been presented and

paid, strengthens Aetna's argument for pre-emption.[1] *See* Resp. Br. 3-4. It follows, therefore, that the conclusion below would apply *a fortiori* when the insurance used to fund plan benefits, *see* ERISA § 3-1(1), 29 U.S.C § 1002(1), treats a benefit as paid as soon as a draft has been issued.

Thus, the State's argument merely emphasizes the extent of the holding below. Nothing in that holding turns on or is restricted to Aetna's accounting system. The holding below subjects, at the least, all insured ERISA plans to the escheat laws of fifty jurisdictions. That holding, with its nationwide effect on nationwide plans, should be reviewed by this Court.

2. The State's sole defense for the construction of Section 502 of ERISA, 29 U.S.C. § 1132, adopted by the court below is a one sentence assertion that the Second Circuit is correct. Resp. Br. 8. The State does not challenge Aetna's showing that the Second Circuit's restriction of Section 502 to actions "governing the issuance of drafts in the first instance," App. A15, is flatly inconsistent with the statutory language. *See* Pet. 17-18. Similarly, Connecticut does not refute Aetna's demonstration that the escheat statute purports completely to displace the remedy provided by Section 502. *See* Pet. 15-16. In light of the importance of Section 502 to the congressional scheme, this Court should review the Second Circuit's restrictive construction of that provision.

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[1] Aetna's accounting system makes the effect of applying the escheat law to ERISA plan benefits more readily apparent, because the benefits Aetna must turn over to the State - and for which it will therefore charge the plans - would otherwise never have entered into the accounting between insurer and plan. Contrary to the State's argument, however, Aetna's accounting system is not the source of the economic detriment caused to plans by application of the escheat law. Obviously, paying a benefit that would otherwise remain unpaid raises costs. That fact is true under any system of accounting.

3. The State does not dispute Aetna's demonstration that complying with the escheat statutes of the various jurisdictions imposes considerable burdens of record keeping, reporting, and administrative action on multi-state ERISA plans. Like the court below, Connecticut simply asserts that the States are free to impose such burdens on ERISA plans because the States' requirements do "not affect the calculation of ERISA benefits, the processing of payment or disbursing benefits [sic] . . .." Resp. Br. 8.

This argument is wrong for two reasons. First, application of escheat statutes very much affects "the processing of payment[s] or disbursing [of] benefits." Indeed, after the period of time specified in the applicable escheat statute, the escheating State inserts itself into the ERISA process as the agent from that time forward for paying previously unclaimed ERISA benefits. Connecticut, like the court below, makes no effort to explain how such a drastic State intrusion into the relationship between ERISA plans and their beneficiaries can be justified.[2]

Moreover, nothing in Section 514(a) of ERISA or in the opinions of this Court supports the contention that ERISA's pre-emption of State laws "insofar as they may now or hereafter relate to" ERISA plans applies only to statutes that affect the initial calculation of benefits owed. Any such restriction undermines Congress' recognition of the inherently multi-state nature of many ERISA plans and its desire to stimulate the provision of benefits by freeing ERISA plans from the costly burdens of complying with the regulatory requirements of the various States.

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[2] The State does not address Aetna's demonstration that compliance with escheat statutes will impose significant burdens not only on ERISA plans but also on ERISA plan beneficiaries. *See* Pet. 21 & n. 29.

4. Apparently recognizing that it cannot defend the basis on which the court below disclaimed inconsistency between its opinion and the opinion of the 11th Circuit in *Blue Cross & Blue Shield of Florida, Inc. v. Department of Banking & Finance*, 791 F. 2d 1501 (11th Cir. 1986), the State argues instead that there is no conflict between the circuits because they were construing different statutes. Resp. Br. 5.[3] The State fails, however, to address the equally indisputable fact that "there is no meaningful difference" between the statutory language construed by the 11th Circuit and Section 514(a) of ERISA. *Blue Cross & Blue Shield of Florida, Inc. v. Department of Banking & Finance, supra*, 791 F.2d at 1504; Pet. 7 & n. 11.

The Eleventh Circuit has held that statutory language essentially identical to Section 514(a) of ERISA precludes the State of Florida from claiming under its unclaimed property act health benefits not collected by federal employees under the federal welfare benefit plan. The Second Circuit has held that Section 514(a) of ERISA does not protect private employers and plans from the assertion of identical State authority. This Court should resolve the conflict between the circuits.

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[3] Aetna clearly states that indisputable fact in its petition. Pet. 7. The State's attempted distinction of the 11th Circuit's opinion on the ground that the court in that case was merely deferring to an administrative construction fails because the agency charged with administering ERISA, the United States Department of Labor, has repeatedly concluded that State escheat laws "relate to" ERISA plans insofar as they apply to unclaimed ERISA plan benefits. See Pet. 21 & n. 24.

CONCLUSION

For the reasons stated above and in Aetna's Petition for Writ of Certiorari, this Court should grant a Writ of Certiorari to review the judgment of the Court of Appeals for the Second Circuit.

Respectfully submitted,

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